Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CATHEY BASKIN,
Petitioner,

vs.

RUTHERFORD COUNTY, a political entity of the State of Tennessee, MARTHA JORDAN WILSON, JANE MAURICE WILSON, DIANE WILSON McCORD, GRASSLAND FINANCIAL SERVICES, INC., and SEBRING CAPITAL CORPORATION,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the retroactive overruling in a condemnation case by a State court of last resort of the settled judicial construction of a statute regarding the passing of real property under statutes of descent and distribution amount to a taking without just compensation in violation of federal constitutional due process guaranties where the heir of a deceased owner of a vested, transmissible remainder interest in real property is thereby retroactively deprived of her right to inherit the decedent's interest in the property?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Cathey Baskin, respectfully requests that a writ of certiorari issue to review the December 29, 2003 order of the Supreme Court of Tennessee denying the Petitioner's motion for leave to file a second petition for rehearing, which motion raised the question of whether the action of the Supreme Court of Tennessee in its opinion on rehearing of October 30, 2003 in retroactively overruling its earlier decision in *Walker v. Applebury,* 218 Tenn. 91, 400 S.W.2d 865 (Tenn. 1965), constituted a taking of the Petitioner's right to inherit under statutes of descent and distribution of the Petitioner's decedent's vested, transmissible remainder interest in real property in violation of federal due process guaranties.

OPINIONS BELOW

The order evincing the discretionary denial by the Supreme Court of Tennessee of the Petitioner's motion for leave to file second petition for rehearing (in which motion the federal issue was first raised in the state court system) is reproduced in the appendix to this petition at App. p. 1. The principal opinion of the Supreme Court of Tennessee, filed May 6, 2003, is reported at 121 S.W.3d 591 (Tenn. 2003), and is reproduced in the appendix to this petition at App. pp. 73–83. The opinion on petition to rehear of the Supreme Court of Tennessee, filed October 30, 2003, is reported at 121 S.W.3d 591 (Tenn. 2003), and is reproduced in the appendix to this petition at App. pp. 86–89.

The opinion of the Court of Appeals of Tennessee, Middle Section, filed February 28, 2002, is unreported and is reproduced in the appendix to this petition at App. pp. 10–70. The opinion and judgment of the Circuit Court for Rutherford County, Tennessee, filed May 3, 2000, are unreported and are reproduced in the appendix to this petition at App. pp. 2–9.

JURISDICTION

The principal opinion of the Supreme Court of Tennessee was filed on May 6, 2003. The opinion on petition to rehear of the Supreme Court of Tennessee, filed October 30, 2003, included the retroactive overruling of that Court's prior judicial construction of the Tennessee Class Gift Statute as set forth in *Walker v. Applebury,* 218 Tenn. 91, 400 S.W.2d 865 (Tenn. 1965). In that the issue of whether the retroactive overruling of *Walker* constituted a taking of property without just compensation in contravention of federal due process guaranties had theretofore not been briefed prior to the occurrence of what the Petitioner contends is an unconstitutional taking, the Petitioner on November 10, 2003 filed a motion for leave to file second petition for rehearing, as required by Rule 39(f) of the Tennessee Rules of Appellate Procedure. This motion, which is reproduced in the appendix to this petition at App. pp. 90–104, was denied by the Supreme Court of Tennessee, without the merits of the constitutional issue being addressed, on December 29, 2003.

A federal constitutional claim which is first raised by petition for rehearing in state court is timely if, as here, it is raised at the first opportunity, even though the petition may be

denied without opinion. *See, Brinkerhoff-Faris Trust & Savings Company v. Hill,* 281 U.S. 673, 677, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment, § 1, states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Tennessee's Class Gift Statute, Tenn. Code Ann. § 32-3-104, provides:

> **32-3-104. Death of class member before time of enjoyment** – Where a bequest, devise, conveyance, transfer or gift is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, and shall have issue surviving when such period arrives or such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is manifested by the will, deed or other instrument. [Acts 1927, ch. 13, § 1; mod. Code 1932, §§ 7598, 8092; T.C.A. (orig. ed.), § 32-305.]

STATEMENT OF THE CASE

This is a case involving condemnation of real property by a county government. The dispute involves the proceeds from the condemnation of real property subject to a life estate, which property was involuntarily conveyed during the lifetime of the life tenant. (App. 14.)

In 1943, Will Jordan conveyed by deed a life estate in approximately 145 acres to his daughter Martha Wilson. (App. 12.) The deed executed by Mr. Jordan granted Ms. Wilson a

life estate in the property with the remainder interest to go to "the heirs of her body on her death, in accordance with the laws of descent and distribution; and should the said Martha Jordan Wilson have no children or representatives of children at her death, then the remainder interest shall go to my next of kin as provided by law." (App. 74.)

Before her death in 2001, Martha Jordan Wilson had three children: Jane Maurice Wilson ("Jane"), William James Wilson ("William"), and Kenneth Dwayne Wilson ("Kenneth"). Jane, who is still living, is not married and has no children. William and Kenneth both predeceased Wilson. William died intestate with no wife or children. Kenneth also died intestate but was survived by a wife, Cathey Baskin ("Baskin"), and a daughter, Diane Wilson McCord ("McCord"). (App. 74–75.)

The Petitioner herein, Cathey Baskin, is the widow of the life tenant's son, who predeceased the life tenant. The Petitioner claims that, under Tennessee's laws of intestate succession, she has a one sixth (1/6) interest in the property because her husband at his death owned a vested transmissible interest in the remainder. (App. 11.)

The life estate property remained intact until the government of the county where the land lies selected a portion of the land as the site for a new school building. (App. 12.) There is no dispute over the county's authority to condemn the subject property or over the amount paid in compensation for the land; the dispute involves the division of that compensation. (App. 15.)

During 1999, Rutherford County in its condemnation

proceeding named as defendants Martha Wilson (the life tenant), Jane Wilson (the life tenant's daughter) and Diane Wilson McCord (the daughter of the life tenant's son, who predeceased the life tenant). In anticipation of the condemnation, Wilson, Jane, and McCord executed a series of quitclaim deeds. Through these deeds, Wilson and McCord purported to convey their interests in the portion of the property subject to condemnation to Jane in exchange for Jane's interest in other portions of the property. In their answers to Rutherford County's petition, Wilson and McCord disclaimed any legal interest in the amount to be tendered by the county and averred that Jane was its exclusive owner. The instant Petitioner, Cathey Baskin, who was not named as a defendant in the condemnation proceeding, filed a motion to intervene in the proceeding to assert her interest in the property. (App. 75.)

The trial court ultimately denied Baskin's motion to intervene and dismissed her cross-claim for declaratory judgment, finding that she held no interest in the property. The Court of Appeals of Tennessee, Middle Section, affirmed the judgment of the trial court. The intermediate appellate court, however, held that each member of the class possessed a contingent remainder prior to Wilson's death and that Kenneth's interest in the property therefore lapsed when he predeceased Wilson. The Supreme Court of Tennessee granted review to determine whether the class members possessed vested or contingent remainders prior to Wilson's death and whether the Petitioner Baskin holds an interest in the property. (App. 75.)

The Tennessee Supreme Court analyzed the Tennessee Class Gift Statute, enacted in 1927 and codified at Tenn. Code

Ann. § 32-3-104.[1] The State Supreme Court construed this statute to mean that "a class gift is a gift to a group of persons who are not named, who have one or more characteristics in common, and whose number may vary." (App. 76.)

The Supreme Court of Tennessee opined that four conditions must be satisfied in order for the Class Gift Statute to apply to a conveyance–the granting instrument must: (1) convey the property to a class;, (2) set the time for distribution "at a subsequent period or on the happening of a future event"; and (3) not show a clear intention to preclude the issue of a deceased class member from taking the share of property that the deceased class member would have taken if living at the time for distribution. See Tenn. Code Ann. § 32-3-104 (1984). Fourth and finally, a member of the class must die before the time for distribution and must have issue living at the time for distribution. (App. 78.)

The Tennessee Supreme Court here found all four requirements to be satisfied and held "that each class member held a vested, transmissible interest in the property prior to [the

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1 "Where a . . . conveyance, transfer or gift is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, and shall have issue surviving when such period arrives or such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is manifested by the . . . deed or other instrument."

life tenant's] death." (App. 81–82.)

In its original opinion the Supreme Court of Tennessee opined that, under the Class Gift Statute, if class members die before the time for distribution, their issue who are living at the time for distribution take the share that the deceased class members would have taken if they had been living and that the instant Petitioner, who is not her late husband's issue, does not take an interest under the statute. The court further ruled that Tennessee's laws of descent and distribution do not apply here because the Class Gift Statute is a more specific statute concerning the distribution of a deceased class member's interest in the property. (App. 82.)

The Petitioner filed a timely petition for rehearing, asserting, among other things, that the court's ruling conflicted with its prior decision in *Walker v. Applebury,* 218 Tenn. 91, 400 S.W.2d 865 (Tenn. 1965). This petition to rehear was granted on August 29, 2003, and the Tennessee Supreme Court ordered further briefing. (App. 84–85.)

On rehearing, the Supreme Court of Tennessee acknowledged the conflict with *Walker.* The court cut the Gordian knot by *sua sponte* overruling *Walker:*

> Baskin asserts that Walker holds that a deceased class member's surviving spouse is entitled to an interest in the subject property under the laws of intestate succession. This proposition was not central to the holding of Walker but is an interpretation that can be gleaned by a careful reading of the opinion. Assuming that the appellant's interpretation of Walker is correct, however, we hold that this interpretation is

> inconsistent with the plain language of the Tennessee Class Gift Statute. We therefore overrule Walker to the extent it holds that a deceased class member's surviving spouse is entitled to an interest in the subject property under the laws of intestate succession.

(App. 86–87.)

The Tennessee Supreme Court's opinion on rehearing (App. 86–89) included no discussion of whether its overruling of *Walker* should operate retroactively or prospectively only. The opinion addressed state statutes–the Class Gift Statute and the statutes of descent and distribution relative to intestate succession–which, under the circumstances of this case, conflicted because application of one would yield a different result from application of the other.

Neither the original opinion of the State Supreme Court nor the opinion on rehearing in this condemnation case addressed whether disqualifying the Petitioner from inheriting her husband's vested, transmissible remainder interest constitutes a taking without just compensation. Neither opinion addressed due process limitations on the ability of a state court to overrule a prior decision retroactively. The Petitioner accordingly filed a timely motion for leave to file a second petition for rehearing which addressed these federal constitutional issues. (App. 91–104.) This motion was denied in a brief per curiam order filed December 29, 2003, (App. 1,) which order did not address the merits of the Petitioner's federal constitutional claims.

Until the *sua sponte* action of the Supreme Court of Tennessee in retroactively overruling *Walker v. Applebury,*

supra, this lawsuit involved only a state court interpreting and applying state statutes and decisional law. The issue of federal constitutional law for which Ms. Baskin intends to seek review by certiorari was first raised in the state court system upon Ms. Baskin's filing on November 10, 2003 of her motion for leave to file a second petition for rehearing, whereby Ms. Baskin complained that the state court's giving retrospective effect to its overruling of *Walker v. Applebury, supra,* thus divesting Ms. Baskin of property that had already vested in her at the time of her husband's death, amounts to an unconstitutional taking of property under the Fifth Amendment. As counsel for Ms. Baskin argued in her November 10, 2003 filing with the Supreme Court of Tennessee:

> ". . . [T]he retrospective overruling of *Walker* impermissibly strips Kenneth Wilson's right to pass on his remainder interest to his spouse and impermissible strips Ms. Baskin of her already-vested interest in her inheritance through intestacy. Under [the Tennessee Supreme] Court's current ruling, Ms. Baskin is divested of protected property rights that have already accrued to her.
>
> "Tennessee is free, on a <u>prospective</u> basis, to determine how property interests in land such as that involved in this case should be transferred among putative heirs. But whether through its legislature or through retrospective overruling of a case under which property rights had vested, the state is <u>not</u> free to undo and thereby divest the already-accomplished transfer of vested and transmissible rights without scrutiny under the Fifth Amendment takings clause and the provisions of the due process clause. This type of retrospective

> deprivation is subject to 'per se' analysis under the takings clause and triggers the necessity of providing 'just compensation.' *Brown v. Legal Foundation of Washington,* 123 S.Ct. 1406, 1418–19 (2003)."

(App. 101–102.)

On March 26, 2004 the Honorable John Paul Stevens, Circuit Justice, extended the time for filing a petition for writ of certiorari to and including May 27, 2004.

REASONS FOR GRANTING THE WRIT

Among the examples listed in Rule 10 of this Court indicating the character of compelling reasons that this Court considers in determining whether to grant review on writ of certiorari is a state court's having decided an important question of federal law in a way that conflicts with relevant decisions of this Court, as well as a state court of last resort's deciding an important federal question in a way that conflicts with the decision of another state court of last resort. Here the Supreme Court of Tennessee has declined to address an important federal question involving due process limitations on taking of real property without just compensation.

The State court of last resort here granted rehearing because its principal opinion conflicted irreconcilably with a prior decision interpreting the Tennessee Class Gift Statute, *Walker v. Applebury,* 218 Tenn. 91, 400 S.W.2d 865 (1965). On rehearing the State court did not attempt to distinguish *Walker,* but merely overruled this prior decision and applied

this overruling retroactively to the instant Petitioner. It is clear that, but for this retroactive application of the earlier decision, the Petitioner would have inherited a share of her late husband's vested, transmissible interest in the real property which is subject to condemnation.

This Court has opined that "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust & Savings Company v. Hill,* 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930). "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.,* at 682.

This Court has held that the government has considerable latitude in regulating property rights in ways that may adversely affect the owners. The Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action – that have particular significance." *Hodel v. Irving,* 481 U.S. 704, 713–714, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). *See also, Eastern Enterprises v. Apfel,* 524 U.S. 498, 523, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). There can be little doubt that the instant condemnation cases poses the quintessential fact pattern to which the takings clause

is directed–the involuntary taking of real property to be used for a public school.

The abolition of descent and/or devise of interests in real property implicates the guaranties of Just Compensation Clause. *See, Hodel v. Irving,* 481 U.S. at 717–718. To do so retroactively implicates due process guaranties. Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history. *Eastern Enterprises v. Apfel,* 524 U.S. at 532. While *Hodel* and *Irving* involved the retroactive application of congressional statutes, prior decisions of this Court indicate that a State's overruling of judicial construction of a statute is similarly limited as to transactions which under the law in force at the time preceding the decision altering the statutory construction.

In *Taylor v. Ypsilanti,* 105 U.S. 60, 26 L.Ed.1008 (1881), the Court opined that "the true rule is to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." *Id.,* at 72, quoting *Douglass v. Pike County,* 101 U.S. 677, 687, 25 L.Ed. 968 (1879).

The Tennessee Supreme Court's retroactive overruling of its prior settled construction of the statute conflicts with decisions of other State courts of last resort. The Supreme Court of Michigan in *Gentzler v. Smith,* 320 Mich. 394, 31 N.W.2d 668 (1948), recognized that, as a general principle, a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law, *subject to the exception that where a constitutional or statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision. Id.,* at 398, 31 N.W.2d at 669. The Michigan court there opined that the "effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, *except in so far as the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decision." Id.,* at 399 (italics in original; underscore added).

The decision of the Supreme Court of Missouri in *Klocke v. Klocke,* 276 Mo. 572, 208 S.W. 825 (1919), is both factually[2] and procedurally[3] on all fours with the instant case.

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2 The plaintiff widow's husband had acquired land that was subject to a life estate in his mother. The decedent died childless and intestate. The mother subsequently died. The widow brought

There, however, the overruling of the judicial construction espoused in the prior decision was applied prospectively only:

> The doctrine of rule of property should not weigh with us in the abolition of a precedent not sustainable in reason and in contravention of the terms of the statute relied upon to support it, and which has wrought injustice in every instance of its subsequent application. In such cases the argument *ab inconvenienti* is stripped of all force, if the law is a growing science, adapting itself to the demands of social justice and the dictates of right reason. In addition to these general motives for the correction of judicial error, the present case does not present the question of the propriety of adhering to a former

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an action to partition the land. The sisters asserted that the widow was not entitled to dower because the decedent had never had possession of the land; therefore she was not entitled to take one-half of the real estate in lieu of dower. The trial court entered judgment in favor of the sisters. On appeal, the court stated that all the deceased left was a landed estate the title of which was vested in him in fee subject to physical possession of the life estate and that under that status the property was not the subject-matter of dower. The court stated that because dower was non-existent the widow took under the provision of Mo. Rev. Stat. § 351 (1909) as a substitute and was entitled to one-half the deceased's estate.

3 The Missouri Supreme Court in *Klocke* overruled its prior construction in *Von Arb v. Thomas,* 163 Mo. 33, 63 S.W. 94 (1901), of Mo. Rev. Stat. § 351, but expressly declined to apply its decision retroactively. 276 Mo. at 581 , 208 S.W. at 827.

> decision for the preservation of intervening property rights acquired thereunder, for the reason that the decision which is overruled in this case, was one which construed a "statute of descents." No property rights acquired under that construction of the statute could be invalidated by a change of construction in a subsequent decision. In that respect the overruling of a previous decision construing a statute or constitution differs from the effect of the overruling of a decision on other topics. In the latter case the effect of the subsequent decision is retrospective and is the same as if there never had been any prior ruling. In the former case (made by the record before us) the effect of our decision is prospective only. The principle governing the case at bar, which is an exception to the general rule, is thus correctly stated: "The true rule in such cases is held to be to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is to say, make it prospective but not retroactive." This is the language of 7 R. C. L., p. 1010, par. 36, and supported by a citation of Federal and State cases. It follows that the concrete case does not fall within that class of cases where it becomes necessary, before overruling a former decision under which property rights have vested, to choose between the relative evils likely to ensue.

276 Mo. at 581–82, 208 S.W. at 827.

The instant decision of the Supreme Court of Tennessee

is inconsistent with that of the Supreme Court of Oklahoma in *Bagby v. Martin,* 118 Okla. 244, 247 P. 404 (1926). The Oklahoma court there opined:

> ". . . [T]he construction of a statute of descent established by the decisions of the courts at the time of a quitclaim deed by heirs claiming under the statute, becomes a part of the contract and must govern the rights of the parties as against a different construction thereafter adopted by overruling the former decisions. The true rule in such case is held to be to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is to say, make it prospective but not retroactive."

Id., at 248, 247 P. At 407–408.

The authorities cited above show that the effect of the Tennessee Supreme Court's retroactive overruling of its prior construction of the Class Gift Statute is to effect a taking of property without just compensation, contrary to the federal constitutional guaranties of due process of law. Review by this Court on writ of certiorari is appropriate as to the important questions of federal constitutional law presented by this case.

CONCLUSION

THE FOREGOING PREMISES CONSIDERED, the Petitioner Cathey Baskin respectfully entreats this Court to grant the writ of certiorari to the Supreme Court of Tennessee in this matter.

Respectfully submitted,

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Appendix 1

FILED DEC 29 2003

IN THE SUPREME COURT OF TENNESSE
AT NASHVILLE

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL.

No. M2000-01382-SC-R11-CV

ORDER

The appellant, Cathey Baskin, has filed a Motion for Leave to File a Second Petition for Rehearing. In her motion, the appellant argues that our Opinion on Petition to Rehear overrules the judicial construction of the Class Gift Statute that is espoused in Walker v. Applebury, 218 Tenn. 91, 400 S.W.2d 865 (1966). Baskin therefore contends that our Opinion on Petition to Rehear should not be applied retroactively because such an application would impair her already-vested property rights and would thus be unconstitutional.

Upon due consideration, we conclude that the appellant's Motion for Leave to File a Second Petition for Rehearing is not well-taken and should therefore be DENIED.

PER CURIAM

Appendix 2

LODGED 4-24-00

IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE
AT MURFREESBORO

RUTHERFORD COUNTY, a political entity of the State of Tennessee, Plaintiff,	)	
vs.	)	Docket No. 42603
MARTHA JORDAN WILSON, JANE MAURICE WILSON and DIANE WILSON MCCORD, and GRASSLAND FINANCIAL SERVICES, INC., and SEBRING FINANCIAL CORPORATION, and CATHEY BASKIN, and JAMES A. WILSON, Defendants.	)	FILED MAY 3 2000

ORDER

This cause came on for final hearing on the 29th day of March, 2000, before the Honorable Don R. Ash, Judge, on the Cross-Claim for Declaratory Judgement of Defendant Cathey

Baskin, upon the stipulation of facts, arguments and legal briefs of counsel and, in fact, the record as a whole, from all of which the Court finds the referenced Cross-Claim without merit as a matter of law as more fully detailed in the Court's letter to respective counsel dated April 16, 2000, which letter is herein adopted berbatim and made a part of the record in this cause.

IT IS ACCORDINGLY ORDERED, DECREED AND ADJUDGED that the Cross-Claim for Declaratory Judgement filed in behalf of Cathey Baskin should be, and hereby is, DISMISSED and for nothing held, it being the express finding of the Court that Cathey Baskin has no legal interest of any kind whatever in the real property no condemnation proceeds which are the subject of the captioned litigation.

The costs of this cause are assessed to Cathey Baskin, for which let execution issue, if necessary.

Enter this the 2 day of ~~April~~ May, 2000.

/s/ Don R. Ash
JUDGE

APPROVED FOR ENTRY:

/s/ Larry K. Tolbert
LARRY K. TOLBERT, Attorney for
Martha Jordan Wilson,
Jane Maurice Wilson and
Diane Wilson McCord

Appendix 4

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to James C. Cope and Jeffrey L. Reed, Attorneys for Plaintiff, 16 Public Square North, Murfeesboro, TN 37130, Andree S. Blumstein and William L. Harbison, Attorneys for Cathey Baskin, 424 Church St., Suite 2000, Nashville, TN 37219, Grassland Financial Services, Inc., 1108 Battlewood Dr., Franklin, TN 37069, and Sebring Capital Corporation, C/O Home Comings Financial Network, 888 S. Greeneville Ave., Suite 200, Richardson, TX 75081-5045, and Jack Evans Gritton, II, Attorney for James A. Wilson, 752 Church St., Murfreesboro, TN 37130, this the 24th day of April, 2000.

/s/ Larry K. Tolbert
LARRY K. TOLBERT, attorney

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Appendix 5

(SEAL OF THE TENNESSEE JUDICIARY)
RUTHERFORD COUNTY AND CANNON COUNTY
CIRCUIT COURT
DIVISION III

DON R.ASH
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FILED
APR 19 2000
8:00 O'CLOCK A.M.

RE: Rutherford County v. Wilson
Circuit Court Docket # 42603

Dear Counselors:

After reviewing the pleadings, responses, and oral arguments of the parties, this Court has decided to deny Cathey

Baskin's motion to be an intervenor/defendant and cross-plaintiff. The facts in this case are straightforward and undisputed by the parties. On December 23, 1942, Will Jordan deeded a life estate of real property consisting of about 145 acres to Martha Jordan Wilson. The deed further provided that "the remainder interest to go to the heirs of her body on her death, in accordance with the laws of descent and distribution." The parties agree that Kenneth Dewayne Wilson possessed a vested interest in the remainder. Kenneth Dewayne Wilson died intestate in 1971. His wife, Cathey Baskin, and his daughter, Diane Wilson McCord, survived him. Prior to his death Kenneth Dwayne Wilson never exercised any control over his vested transmissible interest in the remainder. He never transferred the said interest nor did he receive any monetary benefit because of his possession of the interest.

This case falls within the provisions of T.C.A. § 32-3-104:

> "Where a bequest, devise, conveyance, transfer or gift is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, and shall have issue surviving when such period arrives or such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is manifested by the will, deed or other instrument."

Prior to enactment of this statute, Tennessee courts supported

the so-called "Tennessee Class Doctrine," which held that remainder gifts to a fluctuating class of persons remained contingent until the time set in the will for distribution or payment of the gift. Rennessee case law since passage of T.C.A. § 32-3-104, has held that such a class takes a vested, transmissible interest in the remainder, unless the will unquestionably discloses testator's intention that the interest remain contingent until the date of distribution. Harris v. France, 232 S.W.2d 64 (Tenn. App. 1950); Karsch v. Atkins, 313 S.W.2d 253 (Tenn. 1958); Walker v. Applebury, 400 S.W.2d 865 (Tenn. 1965). In the instant case, it is undisputed that Kenneth Dwayne Wilson possessed a vested transmissible interest in the remainder at the time of his death. Further, he never exercised any control over the vested trasmissible interest. Therefore, at the time of his death his interst transferred to the only heir of the body of Martha Jordan Wilson, Ms. Diane Wilson McCord.

The laws of intestate succession do not apply to this case because Kenneth Dwayne Wilson did not possess the interest at the time of his death. For example, if Kenneth Dwayne Wilson and Cathey Baskin divorced before his untimely death the vested transmissible interest would not be marital property because the scope and size of the class would not be set be [sic] until the death of Martha Jordan Wilson. Thus, the only interest that Kenneth Dwayne Wilson possessed at the time of his death was a vested transmissible interest. According to T.C.A. § 32-3-104, this interest can only be passed to the "surviving issue" of a class member. It is this court's opinion that T.C.A. § 32-3-104 superseded the estate law thus, preventing the vested transmissible interest from entering intonKenneth Dwayne Wilson's estate. Therefore, Cathey Baskin's motion is denied because she is not a member

of the class set forth in the deed nor is she a surviving issue of a deceased class member. Costs are assessed to Cathey Baskin.

Mr. Larry Tolbert shall draw the order.

With kindest regards,

/s/ Don R. Ash
Judge Don R. Ash

DRA:rmb
cc: Court File

Appendix 9

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 4, 2001 Session

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL..

Circuit Court for Rutherford County
No. 42603

No. M2000-01382-COA-R3-CV

FILED

JUDGMENT

FEB 28 2002

This cause came on to be heard upon the record on appeal from the Circuit Court for Rutehrford County, briefs, and oral argument; upon consideration whereof, this Court is of the opinion that there is no reversible error in the order of the trial court.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the judgment of the trial court is affirmed. The cause is remanded to the Circuit Court for Rutherford County for the enforcement of the order, for the collection of the costs accrued below, and for such further proceedings as may be necessary.

Costs of this appeal are taxed against Appellant, Cathey Baskin, for which execution may issue if necessary.

Appendix 10

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 4, 2001 Session

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL.

Circuit Court for Rutherford County
No. 42603

FILED

No. M2000-01382-COA-R3-CV

FEB 28 2002

This appeal involves a dispute over the interpretation of a grant of real property giving a life estate to the grantor's daughter with the remainder to go to the "heirs of her body" and, if at her death there were none, to the grantor's heirs at law. Rutherford County condemned a portion of the property, and the parties dispute apportionment of the condemnation proceeds. The life tenant is still living; therefore, her life estate has not terminated. However, the widow of the life tenant's deceased son claims that she has a one sixth (1/6) interest in the property because her husband owned a vested transmissible interest in the remainder, which passed in part to his widow on his death by intestate succession. The trial court found that Tennessee's statute governing class gifts requires that the son's issue, living at the termination of the life estate, would take his share of the remainder. Therefore, the widow would not be entitled to a portion of the remainder. The widow now appeals to this court. For reasons discussed herein, we affirm the trial court's determination that the widow had no interest in the remainder.

Appendix 11

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Andrée Sophia Blumstein, William L. Harbison, Nashville, Tennessee, for the Appellant, Cathey Baskin.

Larry K. Tolbert, Murfreesboro, Tennessee, for the appellees, Martha Jordan Wilson, Jane Maurice Wilson and Diane Wilson McCord.

OPINION

This case originated from a condemnation action commenced by Rutherford County, in which it sought to take a portion of property held by Martha Jordan Wilson through a life estate granted to her by her father, Will Jordan. As part of that proceeding Rutherford County named Martha Jordan Wilson, her daughter and her granddaughter. The widow of a deceased son of Martha Wilson intervened claiming an interest in the property that was the subject of the condemnation petition. She filed a cross-claim for declaratory judgment to ask the court to hold that she was entitled to a one-sixth interest in the life estate property and entitled to a proportionate share of the proceeds. The court denied this motion.

I. Facts

The parties agree on the facts of this case, and this appeal involves only an application of the law to th_se facts,

which are as follows. In 1942, Will Jordan conveyed by deed a life estate in approximately 145 acres to his daughter Martha Wilson with the remainder to go to the heirs of Martha Wilson's body. Specifically, the deed provides:

> The interest herein conveyed to the said Martha Jordan Wilson is a life estate, in and to the foregoing described property, with the right to take immediate possession thereof, the remainder interest to go to the heirs of her body on her death, in accordance with the laws of descent and distribution; and should the said Martha Jordan Wilson have no children or representatives of children at her death, then the remainder interest shall go to my next of kin as provided by law.

Martha Wilson is still living and is married to James A. Wilson, with whom she has had three children. The first of those children is Jane M. Wilson, who is currently unmarried and has no children. The second is William J. Wilson, who predeceased his parents and left no wife or children. The third child is Kenneth D. Wilson, who also predeceased his parents leaving a widow, Cathey Baskin, and a daughter, Diane Wilson McCord.

The life estate property remained intact until Rutherford County selected a portion of the land as the site for a new school building. Rutherford County named Martha Wilson, Jane Wilson and Diane McCord in its condemnation proceeding. In anticipation of condemnation, the three women executed a series of quit claim deeds, seemingly with the objective of conveying all right, title and interest in the

condemned portion of the life estate property to Jane Wilson, in exchange for her interest in the portion of the life estate property not condemned. Later, in their respective answers to the Petition for Condemnation both Martha Wilson and Diane McCord disclaimed any legal interest in the tender amount, $450,000, and both asserted that the amount is exclusively owned by Jane Wilson.

Cathey Baskin, wife of the late Kenneth Wilson and mother of Diane McCord, was not named in the condemnation proceedings, nor was she a party to the property transfers between Martha Wilson, Jane Wilson and Diane McCord. Ms. Baskin intervened in the case, claiming that she inherited, through intestate succession, a one sixth (1/6) interest in the property. The trial court held that Ms. Baskin did not have an interest in the property because it determined the provisions of Tenn. Code Ann. § 32-3-104 applied, and that pursuant to the case law interpreting this statute, "a class takes a vested, transmissible interest in the remainder." The court then held that:

> At the time of [Kenneth Wilson's] death his interest transferred to the only heir of the body of Martha Jordan Wilson, Ms. Diane Wilson McCord. . . . According to T.C.A. § 32-3-104, this interest can only be passed to the 'surviving issue' of a class member. It is the court's opinion that T.C.A. § 32-3-104 supersedes the estate law [intestate succession] thus, preventing the vested transmissible interest from entering into Kenneth Dwayne Wilson's estate.

Ms. Baskin appeals the trial court's ruling. As the parties agreed, because there is no dispute as to the facts that are relevant to the determination of this claim, this case presents purely a question of law. Consequently, our review of the trial court's determination of the question of law is *de novo*, without any presumption of correctness as to the trial court's decision. Tenn. R. App. P. 13(d); *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

II. Condemnation Proceeds

This appeal involves a dispute over the proceeds from the condemnation of real property subject to a life estate which was involuntarily conveyed during the life tenancy.

> The well-established general rules of eminent domain seem to be that, when a piece of property is taken, in which the ownership is divided into several interests, as between the public and the owners, it is considered one estate; that the public right is exercised upon the land itself without regard to the subdivisions of interest; that the amount of the value of the land to which each one of the owners of the interests is entitled is no concern of the condemnor; that the various owners' interests in the property are transferred to the fund, allowed as damages to compensate them for the injury to the land, which is substituted for the property taken . . . .

Moulton v. George, 208 Tenn. 586, 590, 348 S.W.2d 129, 130 (Tenn. 1961) (citation omitted).

There is no dispute over the county's authority to condemn the subject property or over the amount paid in compensation for the land. The dispute involves the division of that compensation. Thus, we must begin our analysis with the law regarding disposition of such proceeds. In *Beech v. Hibbett*, 2000 Tenn. App. LEXIS 464, No. M1997-00239-COA-R3-CV, 2000 WL 987828 (Tenn. Ct. App. July 19, 2000) (no Tenn. R. App. P. 11 application filed), this court addressed the same question in the context of condemnation of real property in which a life estate existed in the testator's widow with the remainder vested in his daughter. Upon full review of authority on the issue, this court concluded:

> Where the ownership of condemned realty is divided between a life tenant and one holding a vested remainder, the condemnation award should not be merely divided between the owners and paid out. Instead, the entire amount of the award should be made available to the life tenant on specific condition that he or she invest it whole. The life tenant is thereafter solely entitled to all the resulting investment income from the award until the life estate ends naturally or determines on condition, after which the full amount of the original award must be distributed to the holder of the remainder interest.
>
> By allocating the rights to condemnation proceeds in this way, the law attempts to achieve some consistency between the way it treats holders of property interests before and after their realty is, against their volition,

changed into personalty.

Id., at *3 (citations omitted).

The court's reasoning was based upon the principles that: (1) a taking of fee by eminent domain takes all the related property interests, and those interests cease to exist after the taking; (2) the owners of interests in the condemned property are entitled to share ratably in the condemnation proceeds to reimburse them for the value of their interests; (3) while the life tenant is entitled to "use" of the property during the term of the life estate, such entitlement does not include the right to encroach on the corpus or commit waste of the property to the detriment of the remaindermen;[1] (4) when real property is converted to personalty, the life tenant's right to "use" of the property is the right to receive income produced by the property. *Id.* at * 2-3.

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[1] Martha Wilson, as the life tenant, cannot injure or commit waste to the real property to the detriment of the interests of the remaindermen. A life tenant is subject to liability for "an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate . . . which results in its substantial injury," *Chapman Drug Co. v. Chapman*, 207 Tenn. 502, 510, 341 S.W.2d 392, 396 (1960) (quoting Thayer v. Shorey, 287 Mass. 76, 191 N.E. 435, 437, 94 A.L.R. 307), including lasting damage to the remainder or depreciation in its value. *Thompson v. Thompson*, 206 Tenn. 202, 214, 332 S.W.2d 221, 227 (1960); *Barber v. Westmoreland*, 601 S.W.2d 712, 716 (Tenn. Ct. App. 1980). Thus, a life tenant has an obligation to preserve the value of the land for those with subsequent or remainder interests, *see* RESTATEMENT OF THE LAW OF PROPERTY § 138, at 450 (1936), so that "the estate may revert to those having an underlying interest, undeteriorated [by] any willful or negligent act." 93 C.J.S. *Waste* § 1, at 560 (1956). Obviously, sale of a portion of the land would decrease the value of the remaindermen's interests in the entire parcel. Where, through condemnation, an involuntary sale occurs, the life tenant's duty to

Thus, the holding in *Beech* would require that the proceeds from the condemnation herein be paid to the life tenant, Martha Wilson, for investment.[2] She would be entitled to income earned by that investment during her life. Upon the death of Martha Wilson and the concomitant termination of her life estate, the proceeds from the condemnation would be divided among the remaindermen. Unlike the *Beech* case, the case before us does not involve a grant of the remainder to one named person.[3] Instead, the grantor has conveyed the remainder to one of two classes of persons. In situations involving alternative remainders or those to a class of heirs of the body, ordinarily the question of who are the remaindermen entitled to take possession of the real property, and the resulting proportionate share of each, would be left until the termination of the life estate. Similarly, the question of the identity and number of persons entitled to share in the proceeds of the condemned portion of the property would also be left until the termination of the life estate.

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preserve the value of the remaindermen's interest also applies to the proceeds from the condemnation of that portion of the land which was condemned, according to the holding in *Beech*.

[2] Because Martha Wilson has quitclaimed her interest in the condemned property, conveying her life estate interest in that property to Jane Wilson, the duty to preserve the condemnation proceeds may, in fact, have been transferred to Jane Wilson, along with the right to the income from investment of those proceeds during Martha Wilson's life.

[3] The *Beech* case dealt with an unquestionably vested remainder interest, where the main issue in this case is the nature of the interest held by potential remaindermen. We think that distinction, however, does not change the holdings regarding the life tenant's use of income and duty to protect the corpus for the eventual owners.

Since, under *Beech,* a remaindermen's rights in the proceeds do not ripen into possession until the termination of the life estate, no potential remainderman has a present interest in the proceeds which would entitle him or her to an immediate distribution of a share of the proceeds. However, in addition to claiming an interest in the distribution of the proceeds, Ms. Baskin also claims a portion of the remaining real property which is the subject of the remainder. Further, to the extent she is entitled to part of the remainder, she has a present interest in requiring protection of the condemnation proceeds during the life tenancy.[4]

III. Nature of Claim

The essential question involves the nature of the interest held by members of the class, or of either class, of potential remaindermen. Ms. Baskin argues that her husband had a vested transmissible interest in one-third of the land; the other identified potential remaindermen appear to be acting on the belief that they also have a vested interest that can be

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[4] Judicial economy is also served by our determination of the issues raised concerning rights in the remainder. The other known potential remaindermen have entered into conveyances apparently designed to combine the life estate and remainder interests in portions of the land. While the parties are free to transfer whatever interests they hold, such transfers would be ineffectual to deprive other remaindermen, whether that class includes Ms. Baskin or other unknown parties, of their interests in the land retained or the proceeds from the land condemned. Nor can the interests of Will Jordans's "next of kin" be adversely affected. *See Manhattan Savings Bank & Trust Co. v. Bedford,* 161 Tenn. 187, 197-99, 30 S.W.2d 227, 230-31 (1930). In addition, to the extent the parties to the transfers believe they hold and can convey greater interests than they do, outside parties may be affected and additional litigation generated if we fail to clarify those interests.

transferred or conveyed, although it would appear that they define the scope of that interest as one-half each of the remainder. Both these positions appear to rest on a presumption that the membership of the class of remaindermen is determinable before the termination of the life estate. The difference in the size of the portions each asserts she is entitled to is attributable to each party's description of the class of remaindermen

Cathey Baskin argues that she has a one-sixth interest in the life estate property, and the proceeds therefrom. The language of the grant deeding the remainder interest to the "heirs of her [Martha Wilson's] body on her death," would appear to preclude Ms. Baskin's claim because that term does not include a non-lineal descendant, such as a daughter-in-law. Absent language to the contrary, "heirs of the body" means lineal descendants. *Fehringer v. Fehringer,* 222 Tenn. 585, 590, 439 S.W.2d 258, 260 (1969).

> It is settled law in Tennessee that in its primary sense, a remainder to the "heirs of his [life tenant's] body" is a remainder to the life tenant's *lineal descendants*. This was affirmed in *Campbell v. Lewisburg & N.R. Co.*, 160 Tenn. 477, 26 S.W.2d 141 [(1930)]; and *Manhattan Savings Bank & Trust Co. v. Bedford*, 161 Tenn. 187, 30 S.W.2d 227 [(1930)].

Fehringer, 222 Tenn. at 590, 439 S.W.2d at 260 (emphasis in original).

The Supreme Court in *Fehringer* went on to quote the RESTATEMENT OF THE LAW OF PROPERTY, FUTURE INTERESTS,

which was relied upon in *Spencer v. Stanton*, 46 Tenn. App. 688, 333 S.W.2d 225 (1959), as the "clearest statement of the meaning of the words 'heirs of the body:'"

> "When a limitation is in favor of the 'heirs of the body' of a designated person . . . then, unless a contrary intent of the conveyor is found from additional language or circumstances, the persons so described by the limitation as conveyees are the lineal descendants of the designated ancestor who under the applicable local law would succeed to the property if such ancestor died owning the property and intestate at the time when the group is to be ascertained. . . ."

Id., 222 Tenn. At 591, 439 S.W.2d at 260 (quoting *Spencer*, 46 Tenn. App. At 702, 333 S.W.2d at 231 (citation omitted)).

The term, "heirs of the body" is not the same as "heirs" and creates "a remainder altogether different in its meaning and effect . . . ." *Fehringer*, 222 Tenn. at 590, 439 S.W.2d at 260. The term "heirs of the body" and similar terms, such as "bodily heirs" or "bodily issue," are not synonymous with words such as "lawful heirs." *Third Nat'l Bank in Nashville v. Stevens*, 755 S.W.2d 459, 464 (Tenn. Ct. App. 1988) (finding an adopted child is not "bodily issue" of the adoptive parent). While heirs of the body must be "heirs," use of the term limits the grant to those heirs who are "begotten or borne by the person referred to." *Id.* at 463. Ms. Baskin does not meet that requirement.

Further, it is apparent from the language of the grant that the grantor intended that the deeded property go to Martha

Wilson's lineal descendants. Courts, when analyzing deeds of conveyance, as when interpreting a will, attempt to ascertain the intent of the parties in light of the circumstances existing at the time. *Doochin v. Rackley*, 610 S.W.2d 715, 718 (Tenn. 1981). The overriding purpose of any deed interpretation is the determination of the grantor's intent at the time the conveyance was made. *Hall v. Hall*, 604 S.W.2d 851, 853 (1980); *Collins v. Smithson*, 585 S.W.2d 598, 603 (Tenn. 1979). In Tennessee, courts favor the right of a possessor of property to dispose of it "by clear and unequivocal meaning without unreasonable legislative or judicial interference or alteration." *Stevens*, 755 S.W.2d at 464. Thus, although courts have developed rules of construction to aid them in interpreting a grant, such rules are just that, aids in determining the intent of the grantor. The overriding purpose of all rules of construction is the ascertainment of the parties' intent. *Quarles v. Arthur*, 33 Tenn. App. 291, 295, 231 S.W.2d 589, 591 (1950). It is clear that in his first disposition of the remainder Will Jordan intended that the ownership of the land pass only to those persons who were lineal descendants of his daughter Martha Wilson. In fact, the grantor provided that if Martha Wilson had no lineal descendants at her death, "then the remainder interest shall go to my next of kin as provided by law." Thus, the grantor preferred that the land go to his heirs rather than to heirs of Martha Wilson or her non-surviving issue if those heirs were not Martha Wilson's lineal descendants.

Similarly, the class of persons who would take the remainder if no lineal descendants of Martha Wilson exist at the time of her death, the grantor's next of kin, does not include Ms. Baskin, the widow of the grantor's grandson. Absent contrary intentions of the grantor "the words 'next of kin' must be given their ordinary meaning of relatives in blood. They

will not ordinarily include the widow of the testator. And the husband is not 'next of kin' to the wife within the ordinary meaning of a will." *Frank v. Frank*, 180 Tenn. 114, 177, 172 S.W.2d 804, 807 (Tenn. 1943) (citation omitted). In *Frank*, the Tennessee Supreme Court held that the term "next of kin" "has not acquired any meaning other than that of nearest blood relative." *Id.*; *see also Fariss v. Bry-Block Co.*, 208 Tenn. 482, 489-90, 346 S.W.2d 705, 707 (Tenn. 1961).

The basis of Ms. Baskin's claim, however, is not a direct grant to her in the deed. Instead, she asserts that her husband, Kenneth Wilson, had a vested transmissible interest in the property at the time of his death, which upon his death was passed to Ms. Baskin through intestate succession. The foundation of Ms. Baskin's argument is that the remaindermen of the grant were Martha Wilson's three children; that a remainder interest vested in each child during the life tenancy of Martha Wilson; and that each of the three children had a vested, transmissible one-third interest in the remainder.[5] Accordingly, the argument continues, each of the three children could transfer his or her interest, during life or by will or intestate succession upon death.

IV. The Grant Itself

A remainder is a future interest created in a transferee which can become a present possessory estate only upon the

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[5] Ms. Baskin states that William Wilson, a son of Martha Wilson who predeceased her and left no children or other heirs of his body, had a vested one-third interest in the remainder and that, upon the death of the life tenant, his one-third interest would become part of his estate.

expiration of the preceding estate. *Jackson v. Jackson*, 219 Tenn. 237, 242-43, 409 S.W.2d 172, 174-75 (1965); LEWIS M. SIMES & ALLEN F. SMITH, THE LAW OF FUTURE INTERESTS § 64 (2d ed. 1956). The issue of whether an interest in a remainder is vested, and to what extent it is vested, has been the subject of many cases, learned articles, and treatises. When describing types of remainders, different authorities, including various courts, have used terms such as contingent remainder, remainder subject to condition, remainder subject to condition precedent, vested remainder subject to open, vested remainder subject to complete defeasance, indefeasibly vested remainders, and others.[6] Although arguments could be made that the interests conveyed to the remaindermen herein, including Ms. Baskin's deceased husband, are properly classified as any of several of the types of remainders listed above, regardless of the precise term of art to be applied, it is the nature of the interest conveyed which is determinative.[7]

As explained above, our task is to determine the intent of the grantor with regard to the disposition of his property. The beginning point for that inquiry is, of course, the language used by the grantor. The record herein provides few additional facts which could be considered circumstances relevant to the grantor's intent at the time he executed the deed. Because the grantor referred to his daughter by her married name, we know that she was married at the time of the grant. However, the

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[6] One treatise even acknowledges the existence of a "vested interest in a contingent remainder." SIMES & SMITH, *supra*, § 112.

[7] RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) (1989) has taken that approach, generally eschewing the older labels.

record before us does not indicate whether she had any children at the time of the grant.

We begin by restating the grant. *Commerce Union Bank v. Warren County*, 707 S.W.2d 854, 858 (Tenn. 1986). The grant in the deed clearly gave a life estate to Martha Wilson. Upon her death, the remainder will pass to either (1) the class of persons described as heirs of Martha Wilson's body or (2) the class of persons described as the next of kin of Will Jordan, the grantor. Which class of persons will become owners of the fee is to be determined by the grantor's clear criteria: whether, at her death, Martha Wilson has any children or representatives of children, or in other words, heirs of her body.

We interpret this language as requiring the survival of at least one member of the class of Martha Wilson's bodily heirs to the date of her death for that class to take. The result is that the determination of which class of potential remaindermen is to take the property cannot be made until Martha Wilson's death. Whether that provision is considered as creating alternative contingent remainders, a remainder subject to defeasance, a remainder with a condition precedent, or a limitation or gift over on failure of issue, the result is the same. The grantor made provision for disposition of the remainder in either of two sets of circumstances: there are heirs of Martha Wilson's body alive at the time of her death or there are not. Which circumstance exists at that time will determine which class of potential grantees is to receive the remainder.

In *Harris v. Bittikoffer,* 541 S.W.2d 372 (1976), the Supreme Court interpreted a will which devised all of the testator's property to the testator's daughter, Nellie:

> to have and to hold the same *during her natural life, and her bodily heirs, if any, forever*; provided however, that in case daughter [Nellie] *should die leaving no bodily issue*, and her husband . . . should survive her, then *all I have bequeathed to her, shall revert to my granddaughter* [Jawana] *or her heirs.*

Id. at 373 (emphasis in original).

The court held that under this language the daughter took a life estate, with alternative contingent remainders. The alternatives depended upon whether Nellie died without issue and whether her husband survived her. At the time of the appeal, the life tenant, Nellie, was still alive. In discussing the alternative contingent remainders, the Court explained that the first was to the life tenant's bodily heirs or issue if there were any at Nellie's death. "This interest would ripen into a present possessory interest in fee upon the culmination of the prior particular estate, by the death of Nellie." *Id.* at 384. If the life tenant, Nellie, were to die without issue and her husband survived her, the remainder would vest in Jawana in fee simple. *Id.* at 385.[8]

In addition, the *Bittikofer* court held that the time at which to determine whether Nellie Harris had issue was at her

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[8] Interestingly, there was no provision in the will that addressed distribution of the property in the event that Nellie left no issue but was pre-deceased by her husband. Therefore, this will created alternative contingent remainders with the possibility of reverter in that the property would revert to the grantor if both contingent remainders failed.

death. Thus, entitlement to the remainder was to be determined at the termination of the prior estate. *Id.* at 378-80. After reviewing various cases regarding limitations on failure of issue, the court determined that where the disposition is preceded by a life estate, the question of whether there is issue is to be answered at the death of the life tenant, unless otherwise clearly indicated. *Id.* at 380. The court held that the testator in *Bittikofer* intended definite failure of issue, i.e. at the death of the life tenant.

The Supreme Court was called upon to visit the *Harris v. Bittikofer* situation again in an appeal involving collection of fees of the guardian ad litem for the unborn heirs of Jawana Sue Gupton.[9] The Court described its earlier decision as a determination that the interest of the unborn heirs was a remainder following a life estate, contingent upon: (1) Nellie Gupton Harris dying without issue; (2) Nellie predeceasing her husband; and (3) their mother, Jawana, predeceasing them. *Id.* at 814.

Similarly, in *Fehringer,* the Tennessee Supreme Court held that a testamentary gift of a remainder to the heirs of the body of the life tenant created a contingent remainder in such

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[9] The trial court had originally ordered the real property which was subject to Nellie Gupton's life estate sold to pay the fees. Later, it set aside the sale and the lien on the property, and the Supreme Court affirmed that later action, stating, "The lien and sale were void for several reasons; the most obvious is the principle that a contingent remainder interest is not subject to execution and sale by a judgment creditor." *Bittikofer*, 562 S.W.2d at 817. After reassessing costs half to the life tenant and half against the interest of all contingent remaindermen, the court stated, "A lien will be declared upon the remainder interest only, but its enforcement must await the vesting of those interests." *Id.* at 818.

potential heirs and that until the death of the life tenant those heirs were unascertainable. *Fehringer*, 222 Tenn. at 593, 439 S.W.2d at 261-62. The court held, after the death of the life tenant, that because the life tenant died without leaving lineal descendants, the contingent remainder failed. *Id.*[10]

Therefore, we conclude that the gift to the heirs of the body of Martha Wilson is conditioned on there being at least one bodily heir or lineal descendant living at the time of her death. Otherwise, the gift fails and the alternative disposition becomes effective. Consequently, the determination of which class of potential remaindermen will become owners of the property cannot be made until the death of the life tenant. For that and other reasons discussed below, the identity of the individual members of the class who will take, the number who

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[10] The Court further held that because the remainder was not effectually disposed of, it was part of the "rest, residue, and remainder" of the father's estate and passed according to the will's disposition of the residuary estate. *Fehringer*, 222 Tenn. at 593-94, 439 S.W.2d at 262. The court explained:

> by the very nature of a contingent remainder there continued in the testator, at the very time of its creation, a distinct possibility that the contingent remainder would fail for lack of a class in which to vest, and because of this a reversionary interest exists which passes under the residuary clause. This possibility of reverter did not arise after death, but arose when the contingent remainder was created, and is an interest which passed under the residuary clause.

Id. This case does not involve a reversion because the grantor made an alternative disposition of the remainder in case of failure of the first grant on the condition of survivorship of an heir of the body.

will take, and the resulting share of each cannot be determined until the death of the life tenant.

Although we have determined that the identity of which class of potential remaindermen will take remains uncertain until the death of the life tenant, Ms. Baskin's claim relates to her husband's membership in only one of those classes, the heirs of the body of Martha Wilson.[11] Therefore, we will examine the issues raised by the gift to that class, separate and apart from the issues raised by the alternative grant to two different classes.

V. Gift to a Class of Heirs of the Body

A class gift is a gift to a group of persons who are not named, whose number may vary, and who have one or more characteristics in common. *Jennings v. Jennings*, 165 Tenn. 295, 301, 54 S.W.2d 961, 963 (1932). Where the donor has indicated an intent to designate the recipients as a group, rather than to designate as transferees the separate individuals who comprise the group, the gift is one to a class. SIMES & SMITH, *supra*, § 612. Terms which describe the beneficiaries by the membership in an identifiable group are class gift terms. RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) Part V Introductory Note.

In examining the conditional[12] grant upon which Ms.

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[11] Jane Wilson and Diane McCord base their interests on membership in the same class.

[12] Because we have determined that the grant to the heirs of the body is conditioned upon survival of at least one such heir until the death of

Baskin's claim is made, the grantor gave the remainder interest to a defined group or class of people: the heirs of the body of the life tenant. The grantor did not identify individual grantees but described a group of people who were described by a characteristic: lineal descent from Martha Wilson.

One of the issues raised by a class gift is identification of those persons falling within the definition of the class.[13] Ms. Baskin's position rests in part on her interpretation of the deed as making a gift of the remainder to Martha Wilson's three children.[14] We disagree with that interpretation. While Martha Wilson's children are certainly members of the class "heirs of her body," they are not the only members. The grant was not

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the life tenant, we will refer to the grant as conditional.

[13] A determination that a grant is a class gift raises the issues of: (1) who is a member of the gifted class; (2) whether survival to the time of distribution is required in order to participate in the remainder; and (3) how each member's share of the remainder is to be calculated. RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) §§ 25-30 (1989).

[14] A class of children cannot close until the death of the parent. *Scales v. Scales*, 564 S.W.2d 667, 672 (Tenn. Ct. App. 1977). Martha Wilson is still alive and for purposes of legal application we assume that she can bear children regardless of her age. The same is true of her daughter and granddaughter. *Karsch v. Atkins*, 203 Tenn. 350, 353, 313 S.W.2d 253, 254 (1958) (holding that it is a "well recognized principle that in contemplation of law the possibility of issue is never extinguished until death"). Consequently, until the death of Martha Wilson, the number of remaindermen, even under Ms. Baskin's theory, cannot be ascertained. Even where a remainder interest vests, in such a situation it is considered to be subject to open to let in other members of the class. *Scales*, 564 S.W.2d at 672. Ms. Baskin's theory that Martha Wilson's three children each took a one-third interest fails to take into account the possibility of additional members of the class.

made only, or exclusively, to the children either by name or description.

A donor's use of the terms "issue," "descendants," or the like to describe the beneficiaries means a gift to a multigenerational class. RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) § 25.9.[15] The term "heirs of the body" also connotes a gift to a multigenerational class of lineal descendants. *Id.* § 25.9 at com. b. Absent language or circumstances indicating a contrary intent, it is presumed the donor adopted these meanings.

Tennessee courts have adopted presumptive meanings of technical terms such as "heirs of the body." As discussed above, a gift to the heirs of a life tenant's body is a remainder to the life tenant's lineal descendants. *Fehringer*, 222 Tenn. at 590, 439 S.W.2d at 260. Absent circumstances requiring a different interpretation, "heirs of the body" includes generations after children as well as children. *Campbell*, 160 Tenn. at 477, 26 S.W.2d at 141. A similar multigenerational term, "issue," has been interpreted as including "all persons who have descended from a common ancestor, and unless controlled by the context, means lineal descendants without regard to degree of proximity or remoteness." *Burdick v. Gilpin*, 205 Tenn. 94, 109, 325 S.W.2d 547, 554 (1959).

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[15] "When the donor . . . describes the beneficiaries thereof as "issue" or "descendants" of a designated person, the donor has used a class gift term that primarily refers to a succession of generations down from the designated person. The term "children" primarily refers to the first generation down from the designated person." RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) § 25.9 com. a.

Similarly, in *Patterson v. Alexander*, 509 S.W.2d 834 (Tenn. 1974), the court examined the testator's intent in the use of the word "heirs:"

> In Tennessee, the established rule is that the word "children" refers only to immediate offspring. Since the testator chose a term other than "children" to delineate the class of prospective buyers,[16] we assume he did so purposely and had in mind that definition of "heirs" which refers, not to "children" alone, but to the lineal descendants. The will does not suggest any contrary construction.

Id. at 835.

The intent of the grantor controls the meaning of terms used, and where an intent contrary to the legal definition is clear, it will be used. However, when "a technical word is applied to real estate, it must be construed according to its strict legal meaning." *Scruggs v. Mayberry*, 135 Tenn. 586, 602, 188 S.W. 207, 210 (1915). Where technical words are used in a will, they are presumed to be used in a technical sense, and "before another meaning can be attached to them, that meaning must clearly appear . . . ." *Id.* The same rule applies to deeds: unless the plain meaning of the language used or other

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[16] The testator had used the term "children" to refer to the devisees, but changed terms to describe those persons to whom the children could sell their property, and the court found this change of terms signified the testator's intent to distinguish between the two classes. Will Jordan also mentioned Martha Jordan's children or representatives of children, but in a way that is consistent with the multigenerational interpretation.

circumstances dictate the contrary, the technical meaning of terms used in deeds will be applied. *In re Estate of Wilson*, 825 S.W.2d 100, 102 (Tenn. Ct. App. 1991).

We find nothing in the language of the deed or other surrounding circumstances to indicate that Will Jordan intended the phrase "heirs of her body" to mean only Martha Wilson's children and not other generations of descendants as well. To the contrary, the grantor's language indicates an understanding of the technical meaning of "heirs of the body" as well as an intent that generations beyond children be included. The grant makes an alternative disposition "should the said Martha Jordan Wilson have no children or representatives of children at her death." The phrase "representatives of children" refers to the principle that later generations take by representation the share of a deceased parent.

As discussed earlier, "heirs of the body" must be lineal descendants, but also must be the intestate heirs of the person. The legal meaning of the word "heirs" is the class of persons upon whom descent is cast by the statute of descent and distribution. *Fisher v. Malmo*, 650 S.W.2d 43, 46 (Tenn. Ct. App. 1983). The grantor reaffirmed his intention that this meaning attach by directing that the remainder be distributed to the heirs of the body "in accordance with the laws of descent and distribution." In relevant part, the appropriate statute, Tenn. Code Ann. § 31-2-104, provides that issue of the same degree of kinship take equally, but if of unequal degree, the more remote issue "take by representation." Tenn. Code Ann. § 31-2-104(b)(1). The term "by representation" refers to the principle by which the issue of a deceased person take or inherit the share of an estate which their immediate ancestor would have taken or inherited if living. *See* BLACK'S LAW

DICTIONARY 1301 (6th ed. 1990); *see also Barnes v. Redmond*, 127 Tenn. 45, 51, 152 S.W. 1035, 1036 (1913).

Therefore, we interpret the language used as indicating the grantor's intent that more than one generation of lineal descendants be included as potential remaindermen before the remainder passes to his next of kin. Accordingly, we conclude that the conditional grant of the remainder herein was to that class of persons who were the lineal descendants of Martha Wilson, the life tenant. It was not a grant solely to her children.

VI. Requirement of Survival

Having determined that the conditional grant was to the class of "heirs of the body" of Martha Wilson, we must still determine who, within that definition, would take a share of the remainder if it passes to that class. Even persons who are within the primary meaning of the term describing the class may be excluded from taking depending on when class membership is to be determined and whether survival by an individual to the date of possession is a required condition of taking.

> The basic problem is to determine the circumstances in which the owner of a future interest of any type will be required to survive, not the creation of his interest, but rather the date after its creation when his future interest is to become a present possessory interest. Stated in terms of legal consequences, the inquiry is whether or not the future interest is transmissible in his estate in the event of his death prior to the time when it is to become a

present interest.

Herman L. Trautman, *Class Gifts of Future Interests: When is Survival Required?*, 20 VAND. L. REV. 1,15 (1966).

By the specific terms of the deed, the remainder interest is to "go to the heirs of her body on her death." Thus, the future interest in the remainder does not become possessory until the death of the life tenant. The general rule is that a postponed gift to the "issue" or "heirs" of a living person describes a group of persons who cannot be presently ascertained. SIMES & SMITH, *supra*, §§ 579, 732. Tennessee law is in accord. A living person has no heirs, and the membership of the group "heirs of her body" cannot be determined until Martha Wilson's death. *Fisher,* 650 S.W.2d at 46 (interpreting term in will "heirs at law"). "A remainder to the heirs of the life tenant is generally a contingent remainder, for, there being no heirs to a living person, until the termination of the life estate, no one can claim as the heir of the life tenant." *Burton v. Kinney*, 191 Tenn. 1, 6, 231 S.W.2d 356, 358 (1950) (quoting 23 R.C.L., Section 95, page 551); *see also* JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON THE LAW OF WILLS AND ADMINISTRATION OF ESTATES § 463 (1995). Thus, the general rule is that the identity of the members of the class of remaindermen described as heirs cannot be ascertained until the death of the life tenant. Consequently, the size of the class and the portion given to each class member cannot be ascertained until that time.

Applying this general rule to the case at hand, the identity of those "heirs of the body" of Martha Wilson entitled to take a share of the remainder cannot be determined until her death. Thus, no determination can be made prior to that event

of the share to be taken by each heir of the body, assuming that class takes the remainder. *See* PRITCHARD, *supra,* § 463. (Where the gift is of an aggregate sum or entire thing to a body of persons of uncertain existence or indefinite number as a unit, they take as a class, the share of each being dependent upon the ultimate number of persons entitled to take.).

The conclusions resulting from application of these general rules are the conclusions to be reached herein because of the language of the deed. Under Tennessee law, both the use of the term "heirs of the body" and the condition that such heirs of the body of the life tenant exist at the time of her death have significance.[17] The use of the term "heirs of the body" has legal consequences long recognized in Tennessee, and absent clear intent to the contrary, those consequences will be applied. The basic treatment of that term is established in the statute which abolished the Rule in Shelley's Case,[18] Tenn. Code Ann. § 66-

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[17] We have previously discussed the significance of the condition of survival of at least one bodily heir as creating alternative contingent remainders or a remainder subject to a condition. For the present discussion, it is significant because it is additional indicia of the requirement of individual survival to the life tenant's death.

[18] At common law, the Rule in Shelley's Case operated to convert a transfer to A for life, "then to the heirs of A" or "then to the heirs of A's body" into a fee simple transfer to A.

> Under the Rule in Shelley's Case, if a transfer of real property was made by an owner in fee simple to a designated person for life and the same transfer also limited a remainder, either mediately or immediately, to the heirs or to the heirs of the body of the designated person, and the estate for life and such remainder were both legal or both equitable, then the transfer created a

1-103:

> Where a remainder is limited to the heirs or to the heirs of the body of a person, to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are heirs or heirs of body of such tenant, shall take as purchasers,[19] by virtue of the remainder so limited to them.

Tenn. Code Ann. § 66-1-103 (emphasis added).

Thus, under the statute, membership in the class is determined at the time of the death of life tenant and survival

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remainder in the designated person and the words describing the heirs or the heirs of the body were words of limitation determining the type of such person's estate in the remainder.

> The estate for life in the designated person and the remainder in the designated person that resulted from the operation of the Rule in Shelley's Case merged unless there was an intervening estate.

RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) §30.1.

[19] Many opinions describe "heirs of the body" as either words of purchase or words of limitation. Although the correct classification is now largely contextual, *Commerce Union Bank v. Warren County*, 707 S.W.2d 854, 859 (Tenn. 1986), the description used may be a result of whether the Rule in Shelley's Case had been abolished at the time of the grant. As a general statement, words of limitation mark or define the quantum of the estate; on the other hand, words of purchase designate the taker of the estate. *Bittikofer*, 541 S.W.2d at 380-83; Jack D. Jones, *Future Interests - Tennessee Style*, 54 TENN. L. REV. 413, 419 (1987).

to that time is required for an individual to take a share of the remainder. This statute applies to deeds as well as wills. *Butler v. Parker*, 200 Tenn. 603, 611, 293 S.W.2d 174, 177 (1956). Our Supreme Court has recognized and discussed the effect of the statute abolishing the Rule in Shelley's Case. *Bittikofer*, 541 S.W.2d at 380-83. In this 1976 opinion, the Court quoted with approval from *Bedford*, wherein it was determined that the statute had converted "heirs of the body" from words of limitation to words of purchase describing the takers of the remainder.[20] *Bittikofer*, 541 S.W.2d at 380-83 (quoting *Bedford*, 161 Tenn. at 195, 30 S.W.2d at 229).

In *Bedford* the court analyzed a grant of half a farm to the testator's son, Julian T. Bedford for life "and at his death the remainder shall go to the heirs of his body." *Bedford,* 161 Tenn. At 191, 30 S.W.2d at 228. The testator made an identical bequest of the other half of the farm to his other son, and the court interpreted the bequest of the remainders to the heirs of the body of testators's sons as contingent remainders because the identity of the heirs of the body could not be determined until the death of the life tenant.

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[20] "The devise to Julian T. Bedford expressly limits his estate to the period of his life. If he is given more, it is by virtue of the words of the devise: 'and at his death the remainder shall go to the heirs of his body.' Before the statute, these words were words of limitation or descent, and directed that the fee should 'descend' from the life tenant to the heirs of his body. Since the fee could not 'descend' from him who had it not, the words of descent or limitation were held to vest the fee in him who was, in form, only a life tenant. But the statute stripped these words of descent or limitation of their previously possessed characteristic, when used in connection with the creation of a life estate, and recreated them as words of purchase, no longer to convey the meaning of descent or inheritance." *Bedford,* 161 Tenn. at 195, 30 S.W.2d at 229.

In addition, the Court in *Bittikofer* found the case of *Butler v. Parker*, significant to its decision and adopted its holdings. In interpreting a grant to "Ralph Parker and at his death to his bodily heirs," the *Butler* court found the situation controlled by the statute abolishing the Rule in Shelley's Case and that the words conveyed a life estate to the grantee with a contingent remainder to his heirs. *Butler*, 200 Tenn. at 610, 293 S.W.2d at 177. In a section quoted in *Bittikofer*, the *Butler* court further explained:

> Clearly under this statutory provision the heirs or heirs of the body of the grantee which before would have only enlarged the life estate of the parent into a fee has the result of limiting the interest of the grantee in the property devised to a life estate with a contingent remainder in fee to those who at the death of the life tenant will answer the description of the heirs of his body.

Id. 200 Tenn. At 610, 293 S.W.2d at 177.

The *Bittikofer* court applied the statute and the cases mentioned above and others to interpret a devise to Nellie Gupton Harris 'during her natural life, and her bodily heirs, if any, forever . . . .' The court's primary holding was that other provisions of the will created alternative contingent remainders in two classes of possible remaindermen and that entitlement to the remainder could not be determined until Nellie's death, as discussed earlier in this opinion. Nonetheless, the *Bittikofer* opinion is clear that the statute, now Tenn. Code Ann. § 66-1-103, applies to a grant of a remainder to the class of heirs of the body of the life tenant. The statute and the *Bittikofer* opinion clearly state that the remainder would belong to those persons

who on the death of the life tenant actually are the heirs of her body.

In 1963 and again in 1969, our Supreme Court was called upon to determine the interests conveyed by a will provision granting a tract of land to a testator's two sons for life "and upon the death of either of my sons their interest in the above described real property, I hereby give, devise and bequeath unto the heirs of his body." In both opinions the court held that the remainder to the heirs of the body was contingent and the owner(s) of the remainder could not be ascertained until the death of the life tenant. *Fehringer v. Fehringer*, 212 Tenn. 75, 367 S.W.2d 781 (1963); *Fehringer*, 222 Tenn. at 587, 439 S.W.2d at 258.

As these opinions demonstrate, our Supreme Court has consistently held that a remainder to "heirs of the body" of the life tenant is contingent, at least as to any individual,[21] and that the determination of those persons who take the remainder cannot be made until the death of the life tenant, requiring survival to that date. Thus, according to statute and case law, the remainder passes to those persons who, on the termination of the life estate, actually are the heirs of the body.

Tennessee is in accord with the general rule regarding a remainder to the heirs of the body of the life tenant.

> If a gift is made to a class described as the "heirs" of a designated person, or by a similar

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[21] As we have previously determined, the gift herein to the class itself was also conditional, based upon the requirement that at least one member of the class survive the life tenant.

> class gift term, and a particular statute governing the intestate takers of property is to be used to determine the persons who come within the primary meaning of the class gift, in the absence of additional language or circumstances that indicate otherwise, such statute is applied as of the designated person's death.

RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) § 29.4.[22]

> Additionally,
>
> where a postponed gift is given to persons described as the "issue" or "heirs" of a living person, and it is decided that the description is used in its technical sense, then the words describe a group of persons who cannot be presently ascertained. The gift is therefore con-

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[22] This conclusion is explained:

> A statute that prescribes the rules applicable to intestate takers of property operates by ascertaining the takers thereunder at the moment of the death of the person who died intestate. Such takers are the 'heirs' of such person. If the statute were to operate to ascertain the takers thereunder at a time prior to or subsequent to the death of the person who died intestate, the takers would not be the true 'heirs' of such person but would be an artificial group.

RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) § 29.4 com. a.

> tingent, because in order to become an "heir" one must survive his ancestor. There is a requirement of survival, which is normally regarded as a condition precedent.

SIMES & SMITH, *supra,* § 579.

Finally, in an article dealing with rules of construction and donor intent in class gift situations, especially the issue of when survival is required, Professor Trautman explained that the question of who is included in a particular class of beneficiaries is answered by the donor. When the donor's intent regarding that issue, including survivorship to a particular event, is not clear, courts apply rules of construction to determine that intent. Trautman, *supra*, 20 VAND. L. REV. at 11. In those situations, Professor Trautman posited that a requirement of survival may be substantially indicated by the testator's description of the class of intended beneficiaries. Specifically with regard to gifts of a future interest to a class of heirs, next of kin, or similar terms, Professor Trautman explains "The thought often intended to be communicated is that the property should be divided at the end of the life estate among those persons who at that time are the nearest blood relatives, or those blood relatives who would inherit under the laws of intestate succession if the ancestor had died at the termination of the prior estate or at the future event." *Id.* at 18. The article summarizes "while class gifts of future interests to 'children', 'grandchildren', and the like do not imply a requirement of survival to the date of distribution, class gifts of future interests to 'heirs', 'next of kin', and 'issue seem strongly to suggest that the persons who take are required to survive the designated ancestor." *Id.* at 22.

The grantor herein has made his intent abundantly clear. The appropriate rules of construction support that intent, to the extent any construction is needed. Statutory and case law support the result that is reached from simply following the language used by the grantor. Ms. Baskin's late husband was, after the grant and until his death, a potential remainderman because he was a member of the class of Martha Wilson's bodily heirs. He died before the termination of the life estate; any interest he had in the remainder was extinguished at that time. Consequently, he had no interest which could be transferred through his estate.

V. The Class Gift Statute

The trial court determined that the statute applicable to class gifts answered the question of whether Kenneth Wilson possessed an interest which was transmissible to his widow through his estate. That statute provides:

> Where a bequest, devise, conveyance, transfer or gift is made to a class of persons subject to the fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time or payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, and shall have issue surviving when such period arrives or such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is

> manifested by the will, deed or other instrument.

Tenn. Code Ann. § 32-3-104 (1998).

This statute, originally adopted in 1927, was a legislative response to judicial application of Tennessee's common law class gift doctrine. While the descriptions of the purposes and effects of the statute are many and often irreconcilable, it is generally considered to have been intended to relieve the harsh effect of the common law doctrine, at least in some instances, by allowing the surviving issue of a class member who dies before the time the class would have come into possession of the gift to take that class member's share. The result required under the common law doctrine was that the gift to a nonsurviving member of the class would lapse, depriving even his children of any interest.[23]

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[23] The class doctrine first appeared as a judicially created rule of construction in *Satterfield v. Mayes*, 30 Tenn. 58 (1849). In that case the will bequeathed property to M during her natural life and the remainder to M's daughters. The court established the rule which became the Tennessee Class Doctrine:

> The rule is well settled that, where a bequest is made to a class of persons, subject to fluctuation by increase or diminution of its number, in consequence of future births or death, and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event; the entire interest vests in such persons, only, as at that time, fall within the description of persons, constituting such class.

Id. at 59.

The word "'issue' . . . includes all persons who have descended from a common ancestor; unless controlled by the context, it means lineal descendants." ROBINSON & MOBLEY, *supra,* § 461.

> The "issue of the decedent" are, unless otherwise limited, all the direct, lineal descendants of the deceased. *Burdick v. Gilpin*, 205 Tenn. 94, 109, 325 S.W.2d 547, 554 (1959); *Third National Bank in Nashville v. Noel*, 183 Tenn. 349, 358, 192 S.W.2d 825, 828 (1946); and *White v. Kane*, 178 Tenn. 469, 475, 159 S.W.2d 92, 94- 95 (1942) (construction of the antilapse statute). The Tennessee Supreme Court has also noted that the term can be broad enough to cover descendants of every degree. *Lea v. Lea*, 145 Tenn. 693, 697, 237 S.W. 59, 60 (1922).

Carter v. Hutchison, 707 S.W.2d 533, 538 (Tenn. Ct. App. 1985).

The statute would act in this situation to save Kenneth Wilson's portion of the remainder if any of his lineal descendants are alive at the termination of the life estate. That portion, however, would pass to those surviving lineal descendants. Ms. Baskin is not a lineal descendant of her late husband. We think the trial court correctly interpreted the statute.

In *Martindale v. Union Planters Nat'l Bank*, 1996 Tenn. App. LEXIS 298, No. 02 A01-9502-CH-00030, 1996 WL 266650 (Tenn. Ct. App. May 21, 1996) (no Tenn. R. App. P. 11

application filed), this court applied the class gift statute. The will in question created a trust for the benefit of the testator's wife for her life, with the trust estate to be distributed upon the death of his wife equally to his sister, Wilma Cox, and his nephew, Carl Van Kenner, and:

> In the event my said sister or nephew shall predecease the date of distribution leaving children surviving, that share which would have gone to my sister or nephew had she or he survived, shall go to the children of said deceased children or nephew in equal portions . . . .

Martindale, 1996 WL 266650 at *4.

This court determined that the testamentary gift to the children of the testator's sister and nephew was a gift to a class and, therefore, Tenn. Code Ann. § 32-3-104 applied. The court described the statute:

> This statute modified the Tennessee class doctrine by providing that where a bequest is made to a class of persons that is subject to fluctuation by either increase or decrease of its number, and a class member dies before the time established for distribution, the issue of the deceased class member will take that member's share unless a clear intention to the contrary is evinced by the language of the will.

Id. at * 3.[24]

The dispute in *Martindale* involved the disposition of the share given to Wilma Cox. Wilma had three children, one of whom, Duane, predeceased the testator and left two children. When Wilma died, before the life tenant, she was survived by Duane's two siblings, who disputed that Duane's children had an interest in the gift. The court concluded that, pursuant to the statute, the portion of the estate which would have gone to Wilma's son Duane had he not predeceased the life tenant went to his surviving children, unless a clear intent to the contrary was manifested by the will. The court found no such clear contrary intent.

A similar statute, but applicable to immediate rather than postponed gifts, Tenn. Code Ann. § 32-3-103 states that if a devisee or legatee, or member of such class, of an immediate gift dies before the testator leaving issue surviving the testator, such issue shall take the share of the deceased devisee, legatee, or class member, unless a different disposition is otherwise required by the will. In *White v. Kane*, 178 Tenn. 469, 472-73, 159 S.W.2d 92, 95 (1942), the Supreme Court interpreted this provision (then Code Section 8134) as intending to save an immediate gift to a person who predeceased the testator or donor by directing that the deceased

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[24] We note that Ms. Baskin's theory that her husband had a one-third interest in the remainder presupposes that William Wilson, Martha Wilson's other son, also took a vested, transmissible one-third interest, even though he predeceased the life tenant and left no surviving lineal descendants. The class gift statute does not operate to save William's interest because he had no surviving issue. The cases using that statute to find vested interests in some class gifts, discussed later in this opinion, would also appear not to apply to William's interest.

devisee's interest would go to his issue who survived the testator. "The primary purpose of these acts was to prevent this lapse of the devise or legacy, and to save it to the representative of the deceased legatee." *Brundige v. Alexander*, 547 S.W.2d 232, 234 (Tenn. 1976) (quoting *White*, 178 Tenn. at 474, 159 S.W.2d at 94.) This antilapse statute is in furtherance of the presumed intent of the testator, and under it "the issue that survives a deceased devisee or legatee takes as the substituted legatee of the deceased ancestor just as if their names had been inserted in the will by the testatrix itself." *Weiss v. Broadway Nat'l Bank*, 204 Tenn. 563, 573, 322 S.W.2d 427, 432 (1959); *see also Brundidge*, 547 S.W.2d at 233 (quoting passage with approval). The statute is intended to safeguard the interests of those who take under a deceased legatee, not to benefit the deceased legatee. *Id.* This court has recognized that this statute would not apply where the testator's clear intent is that the gift be conditioned upon survival to the death of the testator. *In re Estate of Harper*, 2000 Tenn. App. LEXIS 516, No. M2000-00553-COA-R3-CV, 2000 WL 1100206, at * 3 (Aug. 8, 2000) (no Tenn. R. App. P. 11 application filed). Thus, judicial interpretation of the similarly worded antilapse statute on immediate gifts is consistent with the *Martindale* court's interpretation of the class gift statute.

In the case before us, of course, the result of application of the class gift statute, Tenn. Code Ann. § 32-3-104 (1998), as interpreted as discussed above, is consistent with the language of the grant and with this court's application of the law to the grant.[25] Although the grantor clearly intended that takers of the

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[25] We need not address any issue which may be created by the grant's use of heirs of the body and its reference to the laws of descent and distribution and the statute's use of the term issue.

remainder must survive to the termination of the life estate, he chose language which solved the problem that the statute was designed to correct. By using a multigenerational term and incorporating the law of intestate succession, the grantor protected the interest of lineal descendants. The statute does not, however, support Ms. Baskin's interest in the property and dictates a contrary result.

VI. The Statute, the Class Doctrine, and Vested Interests

Tennessee Code Annotated § 32-3-104 has been interpreted as having a greater effect than our discussion above or its plain language would indicate. Although our courts have been less than consistent in their assessment of its effect, a line of decisional authority developed that forms the basis for Ms. Baskin's claim that her husband possessed a vested, transmissible interest. We begin with the first of the opinions in that line of authority.

Harris v. France, 33 Tenn. App. 333, 232 S.W.2d 64 (1950) (*cert. denied* 1950), involved a challenge to a testamentary trust which provided income to the children of testator's named nieces and nephews, with the trust to cease and the corpus to be distributed to those children when the youngest reached the age of thirty. Because the case involved the Rule Against Perpetuities, the court was required to determine when the children's interests vested. It applied an exception to the common law class doctrine available when the court can find "any slight indication" of an intent on the part of the testator to create separate and severable interests rather than to vest the interest in the class unit. *Id.* 33 Tenn. App. at 349, 232 S.W.2d at 71. The court found such intent to individualize the gifts, and held therefore that although the devise was to a class the

members took several interests, each having a vested equitable interest which was transmissible. *Id.* 33 Tenn. App. at 353- 54, 232 S.W.2d at 73. The court did not apply the common law doctrine.

The *Harris* court's discussion of the common law class doctrine and the statute is important. The court assumed that, absent some exception to the doctrine's application, an individual's interest in a class gift would not vest until the time for distribution of the property. "Under this doctrine the individuals composing the class have no estate prior to the period for distribution but only an expectancy. The mere fact that the time of payment or distribution is postponed implies a condition precedent of survivorship." *Id.* 33 Tenn. App. at 345, 232 S.W.2d at 69 (citations omitted). The court stated that because the doctrine as applied was contrary to the common law and the weight of authority, and because it had been applied to defeat the intent of the testator many times, our courts had become increasingly reluctant to apply it, doing so "only where it was impossible to discover anything in the instrument justifying a refusal to do so." *Id.* (citations omitted).

> In 1927 the legislature took cognizance of the situation and passed a statute embodying a rule of construction designed to avoid the defeat of the testator's intention by the application of the class doctrine as it had theretofore been applied in Satterfield v. Mayes . . . and the cases which followed the rule there announced.
>
> Before the statute, the mere fact without more that the time of payment or distribution was postponed, required the conclusion that

> survivorship was by implication a condition precedent to the vesting of separate estates in the individual members of the class.
>
> The statute forbids such an implication and the fact that the time of distribution is postponed is reduced to a circumstance to be considered along with the other circumstances and provisions of the will in determining whether there is a clear manifestation of an intention that the entire interest vest in such persons only as fall within the description of the persons constituting the class at the time fixed for payment or distribution of the estate. In other words, by virtue of the statute, where applicable, the rule now is that notwithstanding that the time of payment or distribution of the estate is fixed at a subsequent period, or upon the happening of a future event, the individual members of the class will take vested transmissible interest unless the will, considered as a whole in light of all the circumstances, manifests a clear intention to the contrary.

Harris, 33 Tenn. App. At 347-48, 232 S.W.2d at 69-70 (citations omitted).

Thus, according to the *Harris* court, the problem with the Tennessee Class Doctrine was that it had come to be applied formulaically to all postponed gifts to a class regardless of the description of the class or contrary grantor intent. Commentators generally agree with that description.

> If there is a justifiable criticism with regard to the class doctrine in Tennessee, it is that it came to be applied mechanically as a rule of law, and indeed, as a rule of property which could only be changed by the legislature. . . .
>
> The doctrine takes a definite position on all class gifts of future interests, recognizing no distinction between such class designations as "children," "grandchildren," "nephews and nieces," and the like, which do not inherently suggest a requirement of survival, and such class designations as "heirs," "next of kin," "issue," and the like, which seem to suggest inherently a requirement of surviving at least the designated ancestor of such groups. . . . In class gifts to children, grandchildren, nephews and nieces, the doctrine has been applied mechanically to disinherit successors of a deceased child without any effort to analyze the limitation and consider the probable intent of the donor. . . .

Trautman, *supra,* 20 VAND. L. REV. at 23-24.

Although *Harris* became the foundation for the later cases finding vested transmissible interests, we note that one year after the Court of Appeals issued *Harris*, the Supreme Court decided *Denison v. Jowers*, 192 Tenn. 356, 241 S.W.2d 427 (1951), in which it applied the common law class doctrine because the will granted the remainder to testator's siblings at the death of the life tenant, finding the phrase "at her death" indicated the testator's intent that the members of the class

should be determined at the life tenant's death. *Id.* 192 Tenn. at 358, 241 S.W.2d at 428. The Court recognized that the class doctrine "is often a hard rule" and that courts would seize even slight grounds to find a devise to individuals rather than to the class in order to avoid application of the rule. Finding no such language in the devise and feeling compelled to follow prior decisions, the court applied the common law doctrine.

The Court's observation of the effect of the 1927 statute was that "the Legislature did no more than enact a rule which this Court had eagerly followed without legislation." *Id.* 192 Tenn. at 360, 241 S.W.2d at 428. This holding was later criticized by the Tennessee Supreme Court.[26]

The next case in the line relied upon by Ms. Baskin is *Karsch v. Atkins*, 203 Tenn. 350, 313 S.W.2d 253 (1958), and indeed this case is the source of the language which is used in subsequent opinions to apply the statute to create vested interests. The *Karsch* case was a tax case and the issue was the correct exemption to the gift tax to be applied to a gift of money into a trust established for the grantor's daughter for life then for the benefit of the daughter's children. At the time the gift was made, there was only one such child, a Class B beneficiary; the grantor wanted the benefit of the greater exemption available for Class A beneficiaries. The Court resorted, in part, to the class gift statute and stated that by virtue of that statute:

> [T]he rule now is that notwithstanding that the time of payment or distribution of the estate is

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[26] *See* order of the Petition to Rehear in *Walker v. Applebury*, 218 Tenn. 91, 105-06, 400 S.W.2d 865, 870-71 (1965).

> fixed at a subsequent period, or upon the happening of a future event, the individual members of the class will take vested transmissible interest unless the will, considered as a whole in light of all the circumstances, manifests a clear intention to the contrary. Thus it is that the remainder in the instant case is unquestionably vested so that it will descend to the donee's children just as any other vested interest would.
>
> . . . .
>
> This statute contains in its concluding sentence a recognition that a remainder to a class can be construed as contingent. It seems to us though from the language of this statute that an intention to make the remainder contingent must be more or less expressly stated. As we see it the rule should be, in view of this statute, that the estate will be treated as vested unless the contrary is expressly provided for in the will. This is what the statute says - and we must apply it as it reads.

Karsch, 203 Tenn. At 354-55, 313 S.W.2d at 255.

Thus, from *Denison* in 1951 to *Karsch* in 1958, the Supreme Court apparently changed its view of the class gift statute from accomplishing nothing different from what the courts had been doing to effecting a new rule regarding vesting of interests which was to be applied almost presumptively.

In its opinion in *Karsch,* the Court did not address

Harris and offered no explanation for its conclusion regarding the statute. The basis for the court's interpretation of the statute is unclear because by its plain language the statute does not address vesting and does not provide for transfer of a deceased class member's interest during his lifetime by sale or gift or at his death by will. Such a transfer could defeat the interest of surviving issue, a result which appears contrary to the statute.[27] A different interpretation of the statute was given in the next case to address the issue, *Wilson v. Smith*, 47 Tenn. App. 194, 337 S.W.2d 456 (1960). Without referencing the *Karsch* decision, the *Wilson* court stated:

> Our construction of this statute is that, without abolishing the class doctrine rule, it merely adds to membership in the class entitled to take, at the falling in of the life estate or happening of other future event specified, the then surviving issue of anyone who would have been a member of the class if he or she had survived until that time.

Wilson, 47 Tenn. App. At 206, 337 S.W.2d at 461.[28]

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[27] Professor Trautman suggests that the statute "introduces a 'lapse' concept into the problem of survival in an effective gift of a future interest to a class, rather than stressing the transmissibility of the deceased class member's interest. Suppose the will of the deceased class member made a gift of his interest to someone other than his issue?" Trautman, *supra*, 20 VAND. L. REV at 30-31.

[28] We note that the *Wilson* court's construction is similar to that of the court in *Martindale v. Union Planters National Bank*, 1996 WL 266650, discussed earlier.

In *Wilson* the testator devised his real property to his wife in life estate with the remainder to be "equally divided between my brother and sisters, and the children of any deceased brother or sister." This court held that the common law "Class Doctrine," as applied or described in a long line of cases, including *Harris* and *Denison,* applied and that the interests of the members of the class, as individuals, could not be definitely ascertained until the death of the life tenant. Those interests were, therefore, contingent upon survival to the death of the life tenant. The court further held that deeds, wills, and other attempted grants executed by various descendants of the testator's siblings were ineffectual because those descendants held no vested, transmissible interest which they could convey.[29]

The Supreme Court apparently was not impressed with the *Wilson* court's interpretation of the statute. In *Moulton v. Dawson*, 215 Tenn. 184, 384 S.W.2d 233 (1964), although the

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[29] Finding this conclusion a necessary consequence of the class doctrine statute, the court stated:

> In Nichols v. Guthrie, 109 Tenn. 535, 73 S.W.107; Rinks v. Gordon, 160 Tenn. 345, 24 S.W.2d 896, and Felts v. Felts, 188 Tenn. 404, 219 S.W.2d 903, attempted conveyances, by will or by deed, of those who would have inherited if they had survived the life tenant and qualified as members of the class were designated, were held ineffectual; and, in Hobson v. Hobson, 184 Tenn. 484, 201 S.W.2d 659, such conveyance by one of the members of the class who did survive the life tenant, executed before the death of the life tenant, was held good, but solely on the principle of estoppel by deed.

Wilson, 47 Tenn. App. at 203, 337 S.W.2d at 460.

Court held that the class gift statute did not apply because the will in question pre-dated its passage, it nonetheless discussed prior interpretations of the statute, stating that *Karsch* and *Harris* clearly enunciated the change in the law brought about by the statute. With regard to *Wilson v. Smith*, the court noted that the Court of Appeals did not refer to the *Karsch* case which had preceded the *Wilson* case by two years and that the Supreme Court had not reviewed *Wilson* since no petition for certiorari was filed.[30]

After comparing the language in grants involved in various other cases applying the common law class doctrine, the court determined that application of the doctrine was appropriate in *Moulton*. The will in Moulton gave the testator's property to his wife for her life or widowhood, then to his children and "if any children should die leaving children, then such child or children are to take the share their parent would have taken if living." Interesting for its application to the case before us, the lawsuit in *Moulton* was initiated because of a dispute over the distribution of proceeds from a condemnation. The testator's two children alive at the initiation of the lawsuit sought a portion of the proceeds to be shared with their mother, the life tenant, who was still alive. The trial court ruled that the children held vested interests and divided the proceeds proportionately, apparently based on the life tenant's age and life expectancy, among the three parties. The Court of Appeals affirmed the trial court's holding that the remainder was vested based upon *Harris* and *Karsch*.

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[30] In a later decision, the Supreme Court stated that any discussion of the statute in *Moulton* was dictum. *Walker*, 218 Tenn. at 105-06, 400 S.W.2d at 870.

Because the grant pre-dated the statute, the Supreme Court reversed and specifically applied the common law doctrine, holding that "the remainder interest in this property is vested in 'the described class, as a class, and not individually in the persons composing such a class,'" *Moulton*, 215 Tenn. at 193, 384 S.W.2d at 237 (quoting *Satterfield v. Mayes*). Therefore, the devisees of the remainder could not be determined until the death or remarriage of the life tenant, and the children were not entitled to distribution of any of the condemnation proceeds at that time.

Walker v. Applebury, decided a few years later has been cited by the appellant for the proposition that Kenneth Wilson's interest was both vested and transmissible and, consequently, passed through his estate on his death intestate. In *Walker*, the testator granted her husband a life estate in two pieces of real property with a remainder to a class described in various provisions of the will as "the Applebury's," "the Applebury kin" or the "Applebury heirs." The testatrix was a member of the Applebury family, and the land in question had come to her through inheritance from that family; hence her desire to return ownership of the land to her family.

Among the "Applebury kin" that survived the testator was a cousin, Marvin Applebury, who died prior to the death of the life tenant. Marvin Applebury's widow and adopted son brought suit to recover Marvin's share of the devised property on the theory he had a vested interest which passed through his estate to them. The suit was brought after the death of the life tenant.

The Tennessee Supreme Court stated that the question before it was whether the devises were controlled by the

"Tennessee Class Doctrine" enunciated in *Satterfield v. Mayes*. The Court described that doctrine as having long troubled the bench and bar of the state. The Court examined the 1927 statute, beginning with its caption:

> "An Act to so change what is known as 'The Class Doctrine' concerning property to be paid or distributed or divided among members of a fluctuating class at a future time or upon the happening of a future event, that the issue of any member of such class dying would take if living at such future time or at the happening of such future event."

Walker, 218 Tenn. at 96, 400 S.W.2d at 867 (citation omitted).

The Court found that the legislature had intended to make some changes in the class doctrine as it had been applied by the courts, but that "just what changes" the statute accomplished was a decision for the courts. The Court quoted from a number of articles and treatises criticizing the common law doctrine and largely concluding that the statute abolished the doctrine, at least to the extent that the doctrine was contrary to the majority rule, and established "the rules of judicial construction generally applicable in Tennessee and in other common law jurisdictions." *Id.* 218 Tenn. at 98, 400 S.W.2d at 869 (quoting Herman L. Trautman, *Decedents, Estates, Trusts and Future Interest - 1959 Survey*, 12 VAND. L. REV. 1157, 1175 (1959)).

Finding that the case was subject to the 1927 statute,[31] the Court concluded that the case would be decided by applying the following rule:

> That the class took a vested transmissible interest in this estate in remainder upon the death of the Testatrix unless, (1) the will taken as a whole, in light of all the circumstances, requires the remainder to remain contingent, and not vest during the life of the life tenant, in order to carry out the clear intention of the Testatrix, or (2) there is language in the will expressly providing the remainder not vest during the life of the life tenant.

Walker, 218 Tenn. at 101, 400 S.W.2d at 869.

After examining the will, the Court found the testatrix's intent was that the land return from whence it came, to the Applebury family, and that furtherance of that intent did not require that the remainder remain contingent during the life tenancy in order to carry out this clear intent. Therefore, the court concluded that Marvin took a vested transmissible interest in the remainder upon the death of the testatrix.

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[31] At least one commentator has questioned the court's holding that the statute applied, because the statute on its face applies only where a deceased member of the class has issue surviving to the date of distribution. Marvin Walker had no such issue surviving, and although he was survived by an adopted son, the court made it clear that it was not deciding the case on the theory that the adopted son qualified as issue. Trautman, *supra*, 20 VAND. L. REV at 30. Nonetheless, the court in *Walker* based its new rule of construction on the statute.

A "forthright, strong and sometimes testy petition to rehear" was filed.[32] In its response, the Court found that the fact that the appellant, Marvin's son, was adopted was irrelevant. "Royce Marcus Applebury an adoptive son of Marvin Applebury, by virtue of T.C.A. sec. 36-126 would inherit from his adoptive father and not the testatrix." *Id.* 218 Tenn. at 103, 400 S.W.2d at 870. Thus, the Court made it clear

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[32] The petition had asked the court to reconsider its holding in light of a number of cases since 1927 applying the doctrine as set out in *Satterfield.* After considering the listed cases individually, the court summarized them:

> The cases since the Act of 1927 have been looked at and discussed. In only one instance was the will probated after 1927 and that was in the case of *Denison v. Jowers*, supra. In that case the court states why a contingent remainder is created and then goes one step further to say that the statute did not do anything. T.C.A. sec. 32-305 recognizes, of course, that a testator may expressly create a contingent remainder by appropriate words. Since 1927 we have these important cases: *Jennings v. Jennings*, supra, stating that the statute is prospective; *Denison v. Jowers*, supra stating that the statute did not change anything; *Karsch v. Atkins* . . . a tax case which held the statute was applicable and vested transmissible interests were created; and *Moulton v. Dawson* . . . holding, by dictum, that the legislature did what it said it was going to do in 1927 and changed the class doctrine. This case stated that the class doctrine was abolished and T.C.A. sec. 32-305 was applicable for all wills probated after 1927. This case, just as the commentators and authors of law review articles, severely criticized the *Denison* case. The case at bar is in a logical sequence with all the above mentioned cases other than *Denison v. Jowers*, supra.

Walker, 218 Tenn. at 105-106, 400 S.W.2d at 871.

that Marvin had a vested interest which passed through his estate and that his son's interest came from his interest in his father's estate, not from the original grant in the will. This is, in essence, Ms. Baskin's argument herein.

The conclusion that Marvin held a vested interest transmissible through his estate was based upon a determination that identification of those persons in the class of Applebury kin or heirs was to be made at the death of the testatrix ("the class took . . . upon the death of the Testatrix"). The Appelbury heirs were the testatrix's heirs, not the life tenant's.[33] Thus, the result in *Walker* is not inconsistent with our conclusions stated elsewhere regarding Tennessee law. It is well recognized that there is a distinction between a remainder to the heirs of the grantor or testator as opposed to the heirs of the life tenant. The grantor or testator has heirs upon his death. A gift to the heirs of a named person is interpreted as an intent to have the property distributed as the law would distribute it if the named person died intestate. While the normal time for applying the statute of descent and distribution would be on the death of the named person, the grantor may indicate an intent to have it applied (to determine the actual heirs) at an earlier or later time. SIMES & SMITH, *supra,* §§ 732 -34; *see also*

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[33] In the case before us, the class is the heirs of the body of the life tenant. As explained earlier, the identity of heirs cannot be determined until the death of the person to whom they are heirs. Because the identity of the testatrix's heirs or kin could be determined as of her death in *Walker,* the share of each qualifying member of the class could be determined. Because the life tenant had died prior to the lawsuit, as the court stated, the land had been sold and the amount Marvin would have taken was not in dispute in *Walker*. Until the death of the life tenant herein, the number of members of the class entitled to the remainder cannot be determined and, consequently, the size of each member's share cannot be determined.

RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative transfers) § 29.4 (in the absence of indication of different intent, the statute governing intestate succession is to be applied as of the death of the person whose heirs are the named beneficiaries). The court in *Walker* applied the general rule, using the death of the testatrix as the date upon which to identify her heirs.

Tennessee courts have generally found that the time for determining who is an heir depends upon the court's interpretation of the testator's or grantor's intent. *Burdick*, 205 Tenn. at 94, 325 S.W.2d at 547 (construing language of a will as directing when the corpus of trust was to be divided, on the death of the testator's daughter Eleanor, and to whom it was to be divided, members of the beneficiary class who were living at the termination of the trust); *Rinks*, 160 Tenn. at 345, 24 S.W.2d at 896 (grant of life estate to sister and at her death to other brothers and sisters or their heirs who may be living at the death of life tenant's sister indicated intent that only those persons living at the death of life tenant would share and that the determination of the persons by whom the remainder estate should be enjoyed would be made as of that date); *Forrest v. Porch*, 100 Tenn. 391, 45 S.W. 676 (1898) (remainder, after life estate to wife, to testator's heirs at law was contingent because testator obviously intended the land to be divided at the death of his widow among such persons who at that time were his heirs at law). Thus, the *Walker* court's emphasis on the intent of the testatrix is also consistent with established legal principles other than the common law class doctrine or the statute.

In *Nicholson v. Nicholson*, 496 S.W.2d 477 (Tenn. 1973), the Tennessee Supreme Court was called upon to

determine the rights of certain heirs of the testator who left stock in a life estate to his wife, the remainder to go to two named individuals, Ms. Weems and Mr. Wright. The will provided that if the named individuals predeceased the testator's wife, the stock was to go to the testator's heirs at law. The two named individuals predeceased the life tenant. The children of the testator's nephew, George, brought the action. George was alive when the testator died and was at that time one of his heirs at law. He later sold his interest in the stock to the company which had issued it. George outlived Ms. Weems and Mr. Wright, but predeceased the life tenant. His children claimed that his interest had not vested, that they were members of the class of heirs at law at the death of the life tenant, and that George's attempted assignment of his interest could not deprive them of their interests.

Stating that the question to be answered was "at what time the testator's heirs are to be determined," *Id.* 496 S.W.2d at 478, the Court found "the testator wanted to give his stock to a fluctuating class of heirs, the interest in the stock to vest in them at the death of the last remainderman, Wright, and actual possession to follow the death of the life tenant, testator's widow." *Id.* 496 S.W.2d at 480. Consequently, the court affirmed the trial court's holding in favor of the company who had purchased George's stock. In effect, the Court ruled that George's interest vested at the time of the death of Mr. Wright and his conveyance to the company was valid.

Again, this result is not inconsistent with our conclusions elsewhere in this opinion. The condition precedent to the class of heirs at law taking the remainder was removed with the death of Ms. Weems and Mr. Wright prior to the death of the life tenant. At that point, it was clear that the class

would get possession of the remainder at the end of the life tenancy. Further, as discussed above, the fact that the remainder was to go to the testator's heirs at law rather than the heirs of the life tenant brings the case within the general rule that in such situations, the question to be answered, as the court in *Nicholson* recognized, is at what point in time the heirs are to be ascertained. That question is to be answered by the terms of the grant.

The *Nicholson* court relied on the class gift statute and prior judicial interpretation of the effect of the statute:

> Prior to the enactment of this statute, Tennessee courts supported the so-called "Tennessee Class Doctrine," which held that remainder gifts to a fluctuating class of persons remained contingent until the time set in the will for distribution or payment of the gift. That doctrine has been significantly modified by T.C.A. § 32-305 [now 32-3-104]. Tennessee case law since passage of the statute in 1929 [sic] has held that such a class takes a vested, transmissible interest in the remainder, unless the will unquestionably discloses testator's intention that the interest remain contingent until the date of distribution. Harris v. France, 33 Tenn. App. 333, 232 S.W.2d 64 (1950); Karsch v. Atkins, 203 Tenn. 350, 313 S.W.2d 253 (1958); Walker v. Applebury, 218 Tenn. 91, 400 S.W.2d 865 (1965).

Nicholson, 496 S.W.2d at 479. The court adopted and applied the test established in *Walker*: the interests are vested unless the

grant, taken as a whole, required the remainder to remain contingent during the life tenancy.

George's children argued that the language of the will that the stock "be distributed to my heirs at law at the date of death of my said wife" indicated an intent that the stock vest only in those persons who are his heirs at the death of his wife and that the interest remain contingent throughout the life tenancy. The Court, however, found that the language only set the time for distribution, not for vesting. In any event, the Court concluded that, at best, the language in the will implied two different results with equal force and Tennessee law favored vested interests. Accordingly, the Court found that George had a vested interest which he validly conveyed to the company. Again, however, the intent of the testator was the determining factor, and the general presumption that the death of the person whose heirs are the beneficiaries is the date defining the class was applied.

Our review of these cases convinces us that we are not compelled by them to decide Kenneth Wilson died possessed of a vested, transmissible interest in one-third of the remainder, even if the alternative contingent remainder to Will Jordan's next of kin did not exist.[34] First, none of the cases relied upon

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[34] Despite the subtlety of our language herein, it may have become apparent that we have questions about the reasoning behind the Supreme Court's interpretation of the class gift statute first announced in *Karsch*. That interpretation seems inconsistent with the language of the statute and with the Court's interpretation of a similar antilapse statute as discussed in *Brundidge*, 547 S.W.2d at 234, another 1976 opinion. The potential disparity between the *Karsch* interpretation of the effect of the statute and the language of the statute is made clear by Ms. Baskin's claim herein. If her deceased husband had a vested, transmissible interest as she claims the

by Ms. Baskin involves a gift to heirs of the body of the life tenant. The classes in *Harris* and *Karsch* are children. The classes in *Walker* and *Nicholson* are multigenerational classes, but are the heirs of the testator or grantor, not the life tenant. *Bittikofer*, decided after *Nicholson*, held that a postponed gift of a remainder to heirs of the body of the life tenant is contingent, and its restatement of well-settled law has not been altered.

Second, the *Karch* through *Nicholson* line of cases establish a rule of construction which can be overcome by the clear intent of the grantor. Otherwise, application of the court's interpretation of the statute as a rule of law rather than a rule of construction would lead to the same problems caused by earlier application of the common law rule. It is well established in the law generally, and in Tennessee particularly, that the intent of the grantor governs because the courts will recognize the

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Karsch line of cases mandates, he could have sold it to a third party, thereby depriving his daughter or other issue of any interest. This result seems entirely contrary to the language of the statute which saves the interest of a deceased class member, only if he has issue surviving, and allows only the surviving issue to take that share. The requirement that the statute apply only if the deceased class member have issue surviving would indicate that the question of whether the statute applies at all would have to be made after the event triggering distribution.

Nonetheless, we are aware that any reservations we may have about the broad statements in *Karsch* and its progeny are not a basis upon which we can refuse to follow these holdings by the Supreme Court. We are well aware that we are not at liberty to depart from precedent set by the Supreme Court. *Estate of Schultz v. Munford, Inc.*, 605 S.W.2d 37, 39 (Tenn. Ct. App. 1983). We do not do so, but find the conclusion urged upon us by Ms. Baskin from those cases inapplicable because of the language of the grant in the case before us.

right of a individual to dispose of her property as she likes. In the case before us, the intent of Will Jordan is that those persons who are his daughter's bodily heirs alive at her death, if any, will share ownership of the farm. This intent contravenes any rule of construction which would vest interest in a member of the class who predeceases Martha Jordan.

Even in the absence of the alternative contingent remainder to the grantor's next-of kin, we conclude that Kenneth Wilson would not at his death have had a vested interest in the remainder which was transmissible through his estate. As a member of the class of heirs of the body of Martha Wilson, his interest was contingent upon his survival to the termination of the life tenancy. Whether his interest during his life was properly classified as a contingent remainder, remainder subject to condition (of survival to end of life estate), or a remainder subject to complete defeasance (upon death before end of life estate), the result is the same.

This conclusion is supported by Tennessee law, which is consistent with the Restatement's resolution of the issue.

> If a gift is made to a class described as the "issue" or "descendants" of a designated person, or by a similar multigenerational class gift term, in the absence of additional language or circumstances that indicate otherwise, (1) A class member must survive to the date of distribution in order to share in the gift; and (2) such class member in order to share in the gift must have no living ancestor who is a class member.

RESTATEMENT (SECOND) OF THE LAW OF PROPERTY (Donative Transfers) § 28.2.

VII. Conclusion

Under the language of the deed, at the death of the life tenant, the remainder passes to one of two classes. If, at that time, there are no lineal descendants of Martha Wilson alive to take, the remainder passes to the grantor's next of kin. If when the life tenant dies she leaves children or representatives of children, the class of heirs of her body will take the remainder. Those individuals meeting the definition of heirs of Martha Wilson's body who are alive at that time will share in the remainder according to the terms of the statute on descent and distribution. Until the termination of the life estate, no potential member of either class has a vested, transmissible interest in any specific portion of the remainder.

With regard to the claims raised herein by Cathey Baskin, she is not entitled to inherit directly under Will Jordan's deed because she is neither an heir of Martha Jordan Wilson's body nor a next of kin of Will Jordan. Ms. Baskin cannot be an heir of Martha Jordan Wilson's body because she is not a lineal descendant. Ms. Baskin cannot be Will Jordan's next of kin because she is not his blood relative.

Consequently, Cathey Baskin's claim must necessarily be through her deceased husband, Kenneth D. Wilson, who could have been an heir of Martha Jordan Wilson's body. However, Kenneth D. Wilson did not acquire a vested, transmissible interest in the property upon the grant by Will Jordan for two reasons. First and foremost, Will Jordan could not have intended the interests of the heirs of Martha Jordan

Wilson's body to be vested during her lifetime because he included an alternative bequest should she die without surviving heirs of the body that is inconsistent with vesting. Second, Kenneth D. Wilson was not an heir of Martha Jordan Wilson's body because he predeceased her. The heirs of Martha Jordan Wilson's body include her multigenerational, lineal descendants. The members of the class of heirs of Martha Jordan Wilson's body cannot be determined until her death, and a person must survive Martha Jordan Wilson to be an heir of her body.

Even though Kenneth D. Wilson predeceased his mother, Tenn. Code Ann. § 32-2-104 (1998) preserves his interest to his surviving issue, Diane Wilson McCord,[35] but not to his widow. While Diane Wilson McCord (Cathey Baskin's daughter) may eventually qualify as a surviving issue of Kenneth D. Wilson if she survives her grandmother, Cathey Baskin will never qualify as a surviving issue of her late husband.

Accordingly, we affirm the trial court's determination that Ms. Baskin has no interest in the remainder or in the proceeds from the condemnation. Costs are taxed to Ms. Cathey Baskin.

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[35] In addition to being her father's issue, Diane Wilson McCord is a member of the grantee class of heirs of Martha Wilson's body. If she survives Martha Wilson, Diane Wilson McCord will take a portion of the remainder under the terms of the grant itself.

/s/ Patricia J. Cottrell
PATRICIA J. COTTRELL, JUDGE

Appendix 71

FILED May 6 2003

IN THE SUPREME COURT OF TENNESSE
AT NASHVILLE
February 4, 2003 Session

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL.

Circuit Court for Rutherford County
No. 42603

No. M2000-01382-SC-R11-CV

JUDGMENT

This cause came on to be heard upon the record on appeal from the Middle Section Court of Appeals, briefs and arguments of counsel; and upon consideration thereof, This Court is of the opinion that the Tennessee Class Gift Statute applies to the conveyance at issue in the present case. Accordingly, we hold that each of the members of the class takes a vested, transmissible remainder in the property prior to the death of the life tenant and that the appellant does not hold an interest in the property.

In accordance with the opinion filed herein, it is therefore ORDERED AND ADJUDGED by this Court that the judgment of the Court of Appeals concluding that the granting instrument conveyed a contingent remainder to each member of the class and that the conveyance to the appellant's husband

therefore lapsed when he predeceased the life tenant be and the same is reversed. We affirm, however, the Court of Appeals' determination that the appellant holds no interest in the property. We remand this cause to the trial court for proceedings consistent with this opinion.

The costs of this appeal are taxed to the appellant, Cathey Baskin, and her surety, for which execution may issue if necessary.

Appendix 73

IN THE SUPREME COURT OF TENNESSE
AT NASHVILLE
February 4, 2003 Session

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Rutherford County
No. 42603 Don R. Ash, Judge

No. M2000-01382-SC-R11-CV - Filed May 6, 2003

This appeal arises out of a condemnation proceeding brought by Rutherford County against the appellees. The appellant, claiming an interest through her deceased husband in the property to be condemned, filed a motion to intervene in the proceeding. The trial court denied the appellant's motion to intervene and dismissed her cross-claim for declaratory judgment, finding that she held no interest in the property under the provisions of the granting instrument. The Court of Appeals affirmed the judgment of the trial court, holding that the granting instrument conveyed a contingent remainder to each member of the class. As such, the conveyance to the appellant's husband lapsed when he predeceased the life tenant, leaving appellant without an interest in the property. We granted review, and we now hold that each class member held a vested, transmissible interest in the property prior to the death of the life tenant and that the appellant holds no interest in the property. We remand this cause to the trial court for proceedings consistent with this opinion.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed in Part and Affirmed in Part; Case Remanded

JANICE M. HOLDER, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and E. RILEY ANDERSON, ADOLPHO A. BIRCH, JR., and WILLIAM M. BARKER, JJ., joined.

Andrée Sophia Blumstein, William L. Harbison, Nashville, Tennessee, for the defendant-appellant, Cathey Baskin.

Larry K. Tolbert, Murfreesboro, Tennessee, for the defendant-appellees, Diane Wilson McCord, Jane Maurice Wilson, and Martha Jordan Wilson.

OPINION

Factual Background

In 1942, Will Jordan ("Jordan") conveyed real property ("the property") to his daughter, Martha Jordan Wilson ("Wilson"). The deed executed by Jordan granted Wilson a life estate in the property with the remainder interest to go to "the heirs of her body on her death, in accordance with the laws of descent and distribution; and should the said Martha Jordan Wilson have no children or representatives of children at her death, then the remainder interest shall go to my next of kin as provided by law." It is the construction of this language that is the subject of the appeal in this case.

Before her death in 2001, Wilson had three children: Jane Maurice Wilson ("Jane"), William James Wilson ("William"), and Kenneth Dwayne Wilson ("Kenneth"). Jane,

who is still living, is not married and has no children. William and Kenneth both predeceased Wilson. William died intestate with no wife or children. Kenneth also died intestate but was survived by a wife, Cathey Baskin ("Baskin"), and a daughter, Diane Wilson McCord ("McCord").

In 1999, Rutherford County, the county in which the property is located, sought to condemn a portion of the property. In its Petition for Condemnation, Rutherford County named Wilson, Jane, and McCord as defendants. In anticipation of the condemnation, Wilson, Jane, and McCord executed a series of quitclaim deeds. Through these deeds, Wilson and McCord purported to convey their interests in the portion of the property subject to condemnation to Jane in exchange for Jane's interest in other portions of the property. In their answers to Rutherford County's petition, Wilson and McCord disclaimed any legal interest in the amount to be tendered by the county and averred that Jane was its exclusive owner. Baskin, who was not named as a defendant in the condemnation proceeding, filed a motion to intervene in the proceeding to assert her interest in the property.

The trial court ultimately denied Baskin's motion to intervene and dismissed her cross-claim for declaratory judgment, finding that she held no interest in the property. The Court of Appeals affirmed the judgment of the trial court. The intermediate court, however, held that each member of the class possessed a contingent remainder prior to Wilson's death and that Kenneth's interest in the property therefore lapsed when he predeceased Wilson. We granted review to determine whether the class members possessed vested or contingent remainders prior to Wilson's death and whether Baskin holds an interest in the property.

Standard of Review

The facts of this case are undisputed. Therefore, this appeal involves only questions of law. See Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993). The standard of review for questions of law is de novo upon the record with no presumption of correctness.

Analysis

I. Class Members' Remainder Interests

In construing deeds, courts are primarily concerned with ascertaining the intention of the grantor. See Hall v. Hall, 604 S.W.2d 851, 853 (Tenn. 1980); Collins v. Smithson, 585 S.W.2d 598, 603 (Tenn. 1979). Because the law favors the vesting of estates at the earliest practical moment, any doubt regarding the grantor's intent should be resolved in favor of an intention to create a vested remainder rather than a contingent remainder. See Williams v. McFarland, 162 Tenn. 468, 37 S.W.2d 116, 119 (Tenn. 1931). This preference for vested remainders is so strong that "no remainder will be construed as contingent which may, consistently with the [grantor's] intention, be deemed vested." Albright v. Albright, 192 Tenn. 326, 241 S.W.2d 415, 417 (Tenn. 1951).

The preference for early vesting applies with equal force to class gifts. See Nicholson v. Nicholson, 496 S.W.2d 477, 479 (Tenn. 1973); Walker v. Applebury, 218 Tenn. 91, 400 S.W.2d 865, 868-69 (Tenn. 1965); Karsch v. Atkins, 203 Tenn. 350, 313 S.W.2d 253, 255 (Tenn. 1958). A class gift is a gift to a group of persons who are not named, who have one or more characteristics in common, and whose number may vary.

See Jennings v. Jennings, 165 Tenn. 295, 54 S.W.2d 961, 963 (Tenn. 1932); see also Williams, 37 S.W.2d at 118. In 1927, the Tennessee General Assembly enacted the Tennessee Class Gift Statute, which provides:

> Where a . . . conveyance, transfer or gift is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment, distribution, vestiture or enjoyment is fixed at a subsequent period or on the happening of a future event, and any member of such class shall die before the arrival of such period or the happening of such event, and shall have issue surviving when such period arrives or such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is manifested by the . . . deed or other instrument.

Tenn. Code Ann. § 32-3-104 (1984). Prior to the enactment of this statute, Tennessee courts supported a rule of construction that was known as the "Tennessee Class Doctrine." See Satterfield v. Mayes, 30 Tenn. 58, 59 (1850); see also Nicholson, 496 S.W.2d at 479. This doctrine held that remainders to a fluctuating class of persons remained contingent until the time set in the instrument for distribution or payment. See Satterfield, 30 Tenn. at 59; see also Nicholson, 496 S.W.2d at 479. This Court has concluded that the enactment of the Tennessee Class Gift Statute abolished the Tennessee Class Doctrine. See Walker, 400 S.W.2d at 867. Therefore, the rule now is that even if the time of distribution

or payment is set at a subsequent period or upon the happening of a future event, "the individual members of the class will take vested transmissible interest unless the [instrument], considered as a whole in the light of all the circumstances, manifests a clear intention to the contrary." Karsch, 313 S.W.2d at 255.

For the Tennessee Class Gift Statute to apply to a conveyance, the granting instrument must: 1) convey the property to a class; 2) set the time for distribution "at a subsequent period or on the happening of a future event"; and 3) not show a clear intention to preclude the issue of a deceased class member from taking the share of property that the deceased class member would have taken if living at the time for distribution. See Tenn. Code Ann. § 32-3-104 (1984). Fourth and finally, a member of the class must die before the time for distribution and must have issue living at the time for distribution.

As to the first requirement, the deed refers to two groups of people as potential remaindermen. The first clause of the deed conveys the remainder to the "heirs of [Wilson's] body." The deed's second clause defines the remaindermen as "[Wilson's] children or the representatives of [her] children." Both clauses identify a group of people who are not named, who have one or more characteristics in common, and whose number may vary. See Jennings, 54 S.W.2d at 963; see also Williams, 37 S.W.2d at 118. Both groups may also fluctuate in number due to future births and deaths. Regardless of the group to which the grantor intended to convey the remainder, the granting instrument conveys the property to a class.

The deed also satisfies the second requirement of the Tennessee Class Gift Statute. The instrument states that the

remainder interest is to go to "the heirs of [Wilson's] body on her death." It is undisputed that this language sets the time for distribution as the time of Wilson's death, which is the happening of a future event

The statute's third requirement is that the deed not manifest a clear intention to preclude a deceased class member's issue from taking the share of property that the deceased class member would have taken if living at the time for distribution. To make this determination, we are required to identify the class to which the conveyance was made as well as the type of remainder the grantor intended to convey to the class. The deed reads,

> The interest herein conveyed to the said Martha Jordan Wilson is a life estate, in and to the foregoing described property, with the right to take immediate possession thereof, *the remainder interest to go to the heirs of her body on her death*, in accordance with the laws of descent and distribution; and *should the said Martha Jordan Wilson have no children or representatives of children at her death*, then the remainder interest shall go to my next of kin as provided by law.

(Emphasis added).

The granting language in the present case does not provide a clear definition of the class. On one hand, the deed indicates that the class is composed of "the heirs of [Wilson's] body." Case law defines the term "heirs of the body" as the lineal descendants of a designated person who would succeed

to the property of the designated person if that person died intestate owning the property. See Fehringer v. Fehringer, 222 Tenn. 585, 439 S.W.2d 258, 261 (Tenn. 1969). As such, the legal definition of this term requires that the heirs of a designated person's body survive that person. See id. Therefore, if the class is defined as "the heirs of [Wilson's] body," the individual members of the class cannot be determined until the time of Wilson's death, and the interest of any class member who predeceases Wilson would lapse. See id. at 261-62. Thus, the remainder would be contingent. The third requirement will not be met if Jordan intended to convey a contingent remainder. An intent to convey a contingent remainder would manifest a clear intention to preclude a deceased class member's issue from taking the share of the property that the deceased class member would have taken.

The deed, however, must be considered as a whole in light of all the circumstances. See Karsch, 313 S.W.2d at 255. The deed's second clause refers to the class as Wilson's "children or representatives of [her] children." This definition is broader than the legal definition of the term, and it does not require members of the class to survive the life tenant as the legal definition does. The share of the property of a child who predeceases Wilson would pass to that child's representatives. This result is contrary to an intent to convey a contingent remainder. As such, the deed's second clause would satisfy the third requirement of the statute.

Since our primary purpose in construing a deed is to ascertain the intention of the grantor, we shall look to the language and structure of the deed to determine to which class of people Jordan intended to convey the remainder. The language and structure of the deed show that Jordan intended

the second clause to define the first clause. The granting language initially conveys the remainder to the "heirs of [Wilson's] body." However, in explaining what will happen to the remainder in the event that the conveyance to the class should fail, Jordan uses broader language to identify the class. Jordan's decision to add a new, broader phrase instead of merely reiterating "heirs of the body," or a synonymous term, evidences an intent to redefine the term. We conclude that Jordan did not intend to use the legal definition of the term "heirs of the body." Instead, he intended to convey the remainder interest to Wilson's children and to those who would take by representation in the event that any of Wilson's children should die. Accordingly, the deed does not show a clear intention to preclude the deceased class member's issue from taking the share of the property that the deceased class member would have taken if living because the deed does not clearly convey a contingent remainder to the class. The third requirement, therefore, is satisfied

Finally, for the Tennessee Class Gift Statute to apply, a class member must die before the time for distribution and must have issue living at the time for distribution. We have concluded that Wilson's children and the representatives of her children are members of the class of remaindermen. Two of Wilson's children, William and Kenneth, predeceased her. Since the deed sets the time for distribution as the time of Wilson's death, William and Kenneth both died before the time for distribution. Furthermore, Kenneth was survived by his daughter, McCord, who is still living. Therefore, Kenneth had issue living at the time for distribution. Accordingly, all four of the requirements are satisfied, and the Tennessee Class Gift Statute applies to the conveyance. We hold, therefore, that each class member held a vested, transmissible interest in the

property prior to Wilson's death. See Nicholson, 496 S.W.2d at 479; Walker, 400 S.W.2d at 869; Karsch, 313 S.W.2d at 255.

II. Baskin's Interest

Having determined that the members of the class would take vested, transmissible remainders prior to Wilson's death, we must now determine the interest that Baskin holds. First of all, Baskin is not one of Wilson's children or a representative of one of Wilson's children. Thus, she is not a member of the class, and she would not take an interest under the language of the deed.

In addition, we have concluded that [**14] the Tennessee Class Gift Statute applies to the conveyance at issue. Under that statute, if class members die before the time for distribution, their issue who are living at the time for distribution take the share that the deceased class members would have taken if they had been living. See Tenn. Code Ann. § 32-3-104 (1984). Since Kenneth predeceased Wilson, his share would pass to his issue. Baskin is not Kenneth's issue. Therefore, she does not take an interest under the Tennessee Class Gift Statute.

Finally, a basic rule of statutory construction provides that a general statute concerning a subject must defer to a more specific statute concerning the same subject. See Five Star Exp., Inc. v. Davis, 866 S.W.2d 944, 946 (Tenn. 1993). The laws of descent and distribution, therefore, are superseded by the Tennessee Class Gift Statute because it is a more specific statute concerning the distribution of a deceased class member's interest in the property. As such, the laws of descent and distribution do not apply and do not confer an interest in the

property to Baskin. Accordingly, Baskin holds no interest in the property

Conclusion

Because the deed in question does not manifest a clear intention to convey a contingent remainder to the class, we hold that each of the members of the class takes a vested, transmissible remainder in the property prior to the death of Wilson. In addition, we hold that Baskin does not hold an interest in the property. Therefore, the Court of Appeals is reversed in part and affirmed in part, and the case is remanded to the trial court for proceedings consistent with this opinion. Costs of this appeal are taxed to the appellant, Cathey Baskin, and her surety, for which execution may issue if necessary.

/s/ Janice M. Holder
JANICE M. HOLDER, JUSTICE

Appendix 84

IN THE SUPREME COURT OF TENNESSE
AT NASHVILLE
February 4, 2003 Session

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Rutherford County
No. 42603 Don R. Ash, Judge

No. M2000-01382-SC-R11-CV - Filed August 29, 2003

ORDER

The appellant, Cathey Baskin, has filed a petition to rehear the opinion of this Court issued on May 6, 2003. In her petition, the appellant asserts that the Court erred in ruling that the Tennessee Class Gift Statute supersedes Tennessee's laws of descent and distribution. She alleges that this ruling is in conflict with Walker v. Applebury, 218 Tenn. 91, 400 S.W.2d 865 (Tenn. 1965), that it misapprehends the fact that the Class Gift Statute and the laws of intestacy do not deal with "the same subject" and overlooks established legal principles of statutory construction, and that it relies on law upon which the parties have not been heard and which is open to reasonable dispute

Upon due consideration, we conclude that the appellant's petition to rehear is well-taken and should therefore be GRANTED. The appellees are ordered to file a brief in

response to the appellant's petition within 30 days of the filing of this order.

PER CURIAM

Appendix 86

FILED Oct 30 2003

IN THE SUPREME COURT OF TENNESSE
AT NASHVILLE
February 4, 2003 Session

RUTHERFORD COUNTY
v. MARTHA JORDAN WILSON, ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Rutherford County
No. 42603 Don R. Ash, Judge

No. M2000-01382-SC-R11-CV - Filed May 6, 2003

OPINION ON PETITION TO REHEAR

JANICE M. HOLDER, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and E. RILEY ANDERSON, ADOLPHO A. BIRCH, JR., and WILLIAM M. BARKER, JJ., joined.

On May 16, 2003, the appellant, Cathey Baskin, filed a petition to rehear the opinion this Court issued on May 6, 2003. We granted the appellant's petition to consider her assertion that our opinion is in conflict with Walker v. Applebury, 218 Tenn. 91, 400 S.W.2d 865 (Tenn. 1965).

Baskin asserts that Walker holds that a deceased class member's surviving spouse is entitled to an interest in the subject property under the laws of intestate succession. This proposition was not central to the holding of Walker but is an

interpretation that can be gleaned by a careful reading of the opinion. Assuming that the appellant's interpretation of Walker is correct, however, we hold that this interpretation is inconsistent with the plain language of the Tennessee Class Gift Statute. We therefore overrule Walker to the extent it holds that a deceased class member's surviving spouse is entitled to an interest in the subject property under the laws of intestate succession.

In this case, we held that the Class Gift Statute applied to the conveyance at issue and that each of the class members held a vested, transmissible interest in the subject property prior to the life tenant's death. The Class Gift Statute provides that a deceased class member's surviving issue shall take the share of property that the class member would have taken if living at the time for distribution. See Tenn. Code Ann. § 32-3-104 (1984). Therefore, under this statute, only Kenneth Wilson's daughter would be entitled to take his share of the property on the date of distribution. If the laws of intestate succession were applied, however, both Kenneth Wilson's wife and daughter would share his vested interest in the property. Under the laws of intestate succession, a vested, transmissible interest in property is transmitted to an intestate's heirs. See Blackburn v. Blackburn, 109 Tenn. 674, 73 S.W. 109, 111 (Tenn. 1903); Harris v. France, 33 Tenn. App. 333, 232 S.W.2d 64, 73 (Tenn. Ct. App. 1950); see also Tenn. Code Ann. § 31-1-101(9) (1984) (defining "property" under the laws of descent and distribution as "anything that may be the subject of ownership" including "real and personal property or any interest therein"). Accordingly, under the laws of intestate succession, when Kenneth Wilson predeceased his mother, his future interest in the property would pass to his heirs, which would include his surviving spouse. Under these circumstances, the laws of

intestacy are in conflict with the Class Gift Statute.

A basic rule of statutory construction provides that "a general statute concerning a subject must defer to a more specific statute concerning the same subject." Five Star Exp., Inc. v. Davis, 866 S.W.2d 944, 946 (Tenn. 1993). This Court stated the basis for this rule in Koella v. State ex rel. Moffett:

> Where there is a general provision applicable to a multitude of subjects, and also a provision which is particular and applicable to one of these subjects, and inconsistent with the general provision, it does not necessarily follow that they are so inconsistent that they both cannot stand. The special provision will be deemed an exception, and the general provision will be construed to operate on all the subjects introduced therein except the particular one which is the subject of the special provision.

405 S.W.2d 184, 189 (Tenn. 1966) (quoting State v. Safley, 112 S.W.2d 831 (Tenn. 1938)). In our original opinioin, we concluded that the more general laws of descent and distribution would defer to the more specific Class Gift Statute under the circumstances of this case. Both the laws of intestacy and the Class Gift Statute concern the distribution of a deceased person's interest in property. While the laws of intestacy and the Class Gift Statute concern the distribution of a deceased person's interest in property. While the laws of intestate succession apply in any situation where a person dies intestate, the Class Gift Statute only applies when property is conveyed to a class and a member of the class dies before the time for distribution. In such a situation, the plain language of

the Class Gift Statute provides that the deceased class member's issue take his or her share of the property thereby establishing rights in such issue. Because the Class Gift Statute is inconsistent with the laws of descent and distribution under the circumstances of this case, the Class Gift Statute is deemed an exception to the application of those laws.

We have given thorough consideration to the petition to rehear, and we are of the opinion that our original opinion is satisfactory as clarified herein. Accordingly, the petition is without merit.

The costs associated with this petition to rehear are waived.

/s/ Janice M. Holder
JANICE M. HOLDER, JUSTICE

Appendix 90

FILED Nov 10 2003

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

RUTHERFORD COUNTY,
a political entity of the
State of Tennessee,

Plaintiffs-Appellees **Tennessee Supreme Court Appeal**

v. **No. M2000-01382-SC-R11-CV**

MARTHA JORDAN WILSON,
JANE MAURICE WILSON,
and DIANE WILSON McCORD, **Tennessee Court of Appeals, Middle Division, Appeal No. M2000-01382-COA-R3-CV**

and

GRASSLAND FINANCIAL SERVICES, INC., SEBRING CAPITAL CORPORATION, **Rutherford County Circuit Court at Murfreesboro, Tennessee, No. 42603**

and

CATHEY BASKIN

and

JAMES A. WILSON,

Defendants-Appellants.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

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MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

It is only after extensive research and careful consideration that this motion is presented to the Court – and then only with great reluctance to presume again upon the Court's time and patience. Counsel does believe, however, that the motion is well-grounded and necessary to clarify that the Court's overruling of *Walker v. Applebury,* 400 S.W.2d 865 (Tenn. 1965), is prospective only and to avoid an unconstitutional taking in violation of state and feceral law. Therefore, pursuant to Rule 39(f), Tenn. R. App. P., Defendant-Appellant, Cathey Baskin, most respectfully moves this Court to grant her leave to file a second petition for rehearing in this matter for the reasons explained below.

I. Background Relevant to a Second Petition for Rehearing

On May 6, 2003, the Court entered its Judgment and Opinion (copies attached) in this matter. In Part I of the Opinion, the Court held "that each member of the class of remaindermen held a vested, transmissible interest in the [life estate] property" – interests that vested and became transmissible before the death of the life tenant – so that the remaindermen who predeceased the life tenant died owning vested, transmissible remainder interests. Opinion at 5 (emphasis added). In Part II of the Opinion, the Court held that Tennessee's laws of descent and distribution do not apply to confer an interest in the property to Cathey Baskin, because that statute is superseded by the Tennessee Class Gift Statute. Opinion at 6.

Cathey Baskin petitioned for a rehearing on the second part of the Court's ruling – *i.e.,* that the Tennessee Class Gift Statute "superseded" Tennessee's laws of descent and distribution – because, *inter alia,* Part II of the Court's Opinion was in conflict with prior case law, namely *Walker v. Applebury,* 218 Tenn. 91, 400 S.W.2d 865 (1965), *on pet. To rehear,* (Tenn. 1966), and *Nicholson v. Nicholson,* 496 S.W.2d 477 (Tenn. 1973), which reaffirmed *Walker. Walker* stood for the proposition that when a remainderman dies intestate and owning a vested, transmissible interest in a life estate, his surviving widow inherits a portion of her husband's interest by intestacy. *Walker,* 400 S.W.2d at 869. The *Walker* court reached this result with express reference to the Class Gift

Statute, Tenn. Code Ann. §32-3-104.[1] *Walker*, 400 S.W.2d at 869.

This Court granted Mrs. Baskin's petition to rehear and then overruled *Walker* to the extent that it holds that the surviving spouse of a deceased remainderman inherits an interest in the remainderman's vested, transmissible interest under the laws of intestacy. Opinion on Petition to Rehear, October 30, 2003 (copy attached). The Court also reaffirmed Part II of its May 6, 2003, opinion, holding that the Class Gift Statute is an exception to the application of the laws of intestacy, so that in the situation where a remainderman predeceases a life tenant his vested, transmissible interest passes only to his issue under the Class Gift Statute and not under the laws of intestacy and not to anyone else.

Because the Opinion on Petition to Rehear (1) retrospectively – and unconstitutionally – changes the law to deprive Kenneth Wilson and his heirs of vested property rights and (2) will have the effect of clouding many existing titles, Cathey Baskin now most respectfully moves for leave to file a second petition for rehearing in order to bring the question of retroactive application to the attention of the Court for

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[1] The *Walker* Court expressly applied the rule of construction established by Tenn. Code Ann. §32-305 – the Class Gift Statute (now codified at 32-3-104). *Walker*, 400 S.W.2d at 869. With specific reference to the Class Gift Statute, the *Walker* court found not only that Marvin Applebury's remainder interest vested before the death of the life tenant, but also that Marvin Applebury's widow inherited part of that interest from her deceased husband. *Id.* The ruling that Marvin Applebury's widow inherited from her husband was made with specific reference to the Class Gift Statute and with recognition of the fact that neither the widow nor the adopted son was Marvin Applebury's issue.

resolution.

II. Retrospective Application Violates the Tennessee Constitutional Proscription on the Making of Retrospective Laws and the Rule of *Blank v. Olsen*

Cathey Baskin respectfully submits that the retrospective application of the overruling of *Walker* would be unconstitutional and would, moreover, play havoc with existing property rights, so that the overruling of the *Walker* interpretation of the Class Gift Statute should be applied prospectively only. Prospective application would mean, in practical effect, that the overruling of *Walker* would operate only from the date of this Court's final ruling and then only as to property rights that had not already been vested and been transmitted under previous law. Because the overruling would not affect already-vested property rights that had been transmitted or alienated, no such property rights would be impaired or divested; title would not be clouded and certainty of property interests would not be disturbed.

Kenneth Wilson died, intestate in 1971, survived by only two heirs, his wife, Cathey Baskin and his daughter, Diane Wilson McCord.. Cross-Claim ¶¶ 7 and 9, R 43, and Answer To Cross-Claim ¶¶ 7 and 9, R 71. This Court has now held that when Kenneth Wilson died in 1971, he died owning a vested, transmissible interest in the life estate property. May 6 2003, Opinion at 6 and Opinion on Petition to Rehear.

In 1965, The Tennessee Supreme Court in *Walker v. Applebury* had interpreted the Class Gift Statute to allow the widow of a remainderman who predeceased the life tenant to inherit through her husband by intestacy a portion of her

husband's vested, transmissible remainder interest. Judicial interpretation of a statue becomes part of the statute itself as far as property rights are concerned. *See Blank v. Olsen,* 662 S.W.2d 324, 326 (Tenn. 1983)(citations omitted.) Thus, when Kenneth Wilson died in 1971, the 1965 application and interpretation of the Class Gift Statute in *Walker* was the controlling law, according to which Kennedy Wilson's surviving widow – along with his surviving child – each took an interest in his vested, transmissible interest in the life estate property. Kenneth Wilson had not only a vested transmissible interest in the life estate property at his death, but he also he also had a legitimate expectation under the existing law that his interest would pass, in part, to his widow under the "will" that Tennessee makes for its residents who die intestate.[2] Kenneth Wilson's widow, too, had a legitimate belief and expectation that her husband's interest passed to her *pro rata* under the lf intestacy.

Walker established these rights under the Class Gift Statute. *See Blank v. Olsen*, 662 S.W.2d 324, 326 (Tenn. 1983). Overruling the *Walker* interpretation and application of the Class Gift Statue and applying the new judicial

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[2] The Tennessee laws of intestacy are substantive rules of law, the purpose of which is to effectuate a complete and orderly distribution of intestate estates in accordance with public policy determined by the legislature. *See Rippeth v. Connelly,* 447 S.W.2d 380, 382 (Tenn. App. 1969), *cert. Denied,* (Tenn. 1969). They are, in effect, the last will and testament of every Tennessean who dies intestate. They provide that, when a person dies intestate, all the property that he owns passes to his "heirs" as set out in the statute, Tenn. Code Ann. §31-2-3-1. "Heirs" is defined to include the surviving spouse. Tenn. Code Ann. §31-2-101(5). This definition embodies a strong policy of spousal protection and establishes complementary rights on the part of heirs.

interpretation as the Court has done on the first Petition to Rehear impairs Kenneth Wilson's vested property right vested property, deprives him of his right to transmit his and deprives his widow) more than 30 years ago. The answer under Tennessee law is that the overruling of *Walker* should be applied prospectively only so as not to impair the vested property rights of Kenneth Wilson or his widow in violation of the Tennessee Constitution.

The Tennessee Constitution, Article I,§20, provides that no retrospective law shall be made that divests or impairs vested rights including vested *property* rights. *Dark Tobacco Growers' Co-op Ass'n v. Dunn* 266 S.W. 308, 312 (Tenn, 1924); *Morris v. Gross, 527* S.W.902, 905 (Tenn. 1978) This constitutional prohibition on retrospective laws impairing vested interests not just to legislative *enactments*, but also to the judicial interpretation of statues that concern property rights. *See Blank v. Olsen*, 662 S.W.2d, 324, 325-26 (Tenn. 1983).

Accordingly, it is the rule that the ""overruling of a judicial construction of a statute will not be given retroactive effect. Such a decision will be limited to the effect ordinarily inherent in a legislative change of a staturory rule,merely prospective effect. This principle has been applied, for example, to a change, by reversal of prior decisions, in the judicial construction of a statute of descent.'" *Id.* (citations omitted, emphasis added). This "prospective only" rule applies when, as in this case, the judicial construction of a statute is overruled, precisely because vested rights are involved.[3] Thus,

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[3] This rule is distinct and different from the rule that applies when a court makes changes in the common law where, generally, no vested rights are at

the overruling of *Walker* should be applied prospectively only.[4]

III. Retrospective Application Would Cloud Existing Property Titles and Create Uncertainty With Regard to the Effect of Alienation of Future Interests

If the overruling of *Walker* is not limited to prospective application, a cloud will be cast upon many a title and uncertainty will invade an area - property rights and their alienability - where certainty has been the primary policy goal of the law.

Tennessee policy favors the vesting of estates at the earliest practicable moment because doing so makes the planning and settling of estates easier and more certain. To that end, under long-standing Tennessee precedent, a vested, transmissible remainder interest may be transmitted upon his death by will or by operation of the laws of intestacy. *Harris v. France,* 33 Tenn. App. 333, 354, 232 S.W. 2d 64, 73 (Tenn. App. 1950),*cert.den.*, (Tenn. 1950) (upon the death of one member of a class of remaindermen, his transmissible interest "passes to his heirs, distributees, or devisees as the case may

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stake. In changing the common law, the court may, if it so expresses, make its ruling retrospective. *See, e.g., McIntyre v. Balentine,* 833 S.W.2d 52 (Tenn. 1992)(changing common law as to negligence).

[4] The U.S. Supreme Court has observed that "[r]etroactivity is generally disfavored in the law." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 532 (1998). Retroactivity "can deprive citizens of legitimate expectations and upset settled transactions." *Id.* at 533. Thus, the "unfairness" inherent in retroactive state action is more serious than with prospective state action, as demonstrated in this case.

be.") Similarly, a vested, transmissible remainder interest is subject to sale by its owner and may be available to creditors to satisfy debts incurred by the owner.[5] *Davis v. Bawcum*, 57 Tenn. 406, 408 (Tenn. 1873).

In short, the law is that a vested, transmissible remainder interest may be transmitted deed or similar conveyance, by will, or by operation of law such as the rules of descent and distribution, But the holding in this case as it now stands and if applied retroactively has the anomalous effect of rendering a vested, transmissible reminder interest non-transmissible. If the interest of a remainderman who predeceases the life tenant can only pass to his issue under the Class Gift Statute, then he cannot freely alienate his interest as long as the life tenant lives, because, until the life tenant dies, it is always possible that the remainderman will predecease the life tenant. Such a restriction on alienability is, of course, contrary to settled law, which clearly allows a remainderman with a vested transmissible interest to convey that interest by *intervivos* transfer, by will, or by operation of law, any of which conveyances may result in transmission of the interest to someone other than the issue of the remainderman. It also flies in the face of the policy underlying that law – the policy of allowing free and clear alienability of property interests.

Retroactive application of the Court's ruling in this case will cast a cloud upon many existing property rights, opening

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[5] In this very case, for example, Kenneth Wilson's sister, Jane, twice borrowed money against her future remainder interest in the life estate property and executed deeds of trust in favor of Grassland Financial Services, Inc. and Sebring Capital Corporation. Answer of Jane Wilson to Petition for Condemnation ¶12 and attachments, R 12-19.

a veritable Pandora's box. For example, if a remainderman who predeceased the life tenant left his remainder interest to a charity under his will, may his issue now assert rights in that interest? If he left the remainder interest to his widow under his will, does that interest now belong to the children? (Or does the ruling in this case create the anomalous and inequitable situation where the widow of an intestate remainderman cannot inherit, but the widow of a remainderman who dies testate can?) If he made an *intervivos* gift of his remainder interest to his best friend, must the friend now cede the property to the remainderman's issue? If he pledged his remainder interest to a creditor who is not his issue, what security does the creditor now have?

Applying the ruling in this case prospectively only as required under the rule set out in *Blank v. Olsen* would avoid the constitutional pitfall and would have the added benefit of keeping the lid on Pandora's box.

IV. The Retrospective Overruling of *Walker v. Applebury* Raises a Substantial Question of Whether a Taking a Vested Property Has Occurred Without Just Compensation in Violation of the Fifth Amendment and *Hodel v. Irving*

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const., Amend. V. "Because the Constitution protects rather than creates property interests the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Washington Legal*

Foundation, 524 U.S. 156, 163-64 (1998)(internal quote omitted). Therefore, when "property" as defined by Tennessee law is taken without just compensation, the protections of the Fifth Amendment attach.

This Court has held that Kenneth Wilson had a vested, transmissible interest in the life estate property and noted that, "[u]nder the laws of intestate succession, a vested transmissible interest in property is transmitted to an intestate's heirs." Opinion on Petition to Rehear, p.1 "Accordingly, under the laws of intestate succession, when Kenneth Wilson predeceased his mother, his future interest in the property would pass to his heirs, which would include his surviving spouse." *Id.*, p.2 That is, under the laws of intestate succession, Kenneth Wilson's vested, transmissible remainder interest was a form of "property" that would devolve in part to Kenneth Wilson's wife (Cathey Baskin). Under *Walker v. Applebury,* as the Court's rehearing opinion also stated, Ms. Baskin "is entitled to an interest in the subject property under the laws of intestate succession." *Id.,* p.1.

In this case, *Walker* established that the laws of intestacy applied to transfer to Ms. Baskin a vested property interest at the time of her husband's death. Once Kenneth Wilson's vested, transmissible property interests and Ms. Baskin's property right of intestate succession were recognized under Tennessee law, those property rights became subject to the protections of the federal takings clause. Thus, the retrospective overruling of *Walker* has the effect of **divesting** Ms. Baskin of property that, under Tennessee law, had already vested in her at the time of Kenneth Wilson's death.

Overruling *Walker* with retroactive effects strips Ms.

Baskin of that vested property right and brings into force the protections of the Fifth Amendment taking clause. The current retrospective application of the overruling of *Walker* will, therefore, deprive Kenneth Wilson and Cathey Baskin of vested property rights in violation of the U.S. Constitution. Avoiding this constitutional violation is a separate and independent reason for limiting this case to prospective application only.

Hodel v. Irving, 481 U.S. 704, 717 (1987), provides a useful analogy. In that case a federal statute stripped a property owner of a right to pass on an interest by descent or devise. The Supreme Court held that the federal statute amounted to an unconstitutional taking under the Fifth Amendment. Similarly, the retrospective *overruling* of *Walker* impermissibly strips Kenneth Wilson's right to pass on his remainder interest to his spouse and impermissibly strips Kenneth Wilson's right to pass on his remainder interest to his spouse and impermissibly strips Ms. Baskin of her already-vested interest in her inheritance through intestacy. Under this Court's current ruling, Ms. Baskin is divested of protected property rights that have already accrued to her.

Tennessee is free, on a <u>prospective</u> basis, to determine how property interests in land such as that involved in this case should be transferred among putative heirs. But whether through its legislature or through retrospective overruling of a case under which property rights had vested, the state is <u>not</u> free to undo and thereby divest the already-accomplished transfer of vested and transmissible rights without scrutiny under the Fifth Amendment takings clause and the provisions of the due process clause. This type of retrospective deprivation is subject to "per se" analysis under the takings clause and triggers the necessity of providing "just compensation." *Brown*

v. Legal Foundation of Washington, 123 S.Ct. 1406, 1418-19 (2003).[6]

V. Conclusion

To bring before the Court for consideration and resolution the issue of retrospective application of its ruling in this case and the state and federal constitutional questions involved, Defendant-Appellant Cathey Baskin respectfully moves this Court to grant her motion for leave to file a second petition for rehearing.

Respectfully submitted this 10th day of November, 2003,

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[5] For examples of retroactive or unanticipated decisions that have been found unconstitutional under due process, see *Reich v. Collins,* 513 U.S. 106 (1994)(court cannot change rules and thereby deny a party a vehicle for redress of grievance); *Brinkerhoff-Faris Trust & Sav. Co. V. Hill,* 281 U.S. 673 (1930(due process violated when state court denies relief on ground that plaintiff failed to pursue administrative remedies, where state's prior "settled" law made clear that no such administrative remedies existed).

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2003, a true and complete copy of the foregoing Rule 39 Motion for Leave to File a Second Petition for Rehearing of Defendant-Cross-Plaintiff-Appellant Cathey Baskin was mailed First Class U.S. Mail, postage prepaid, to:

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Appendix 104

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